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# In The Supreme Court of the United States

MASOUD AHMAD KHAN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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## QUESTIONS PRESENTED

1. Whether the Fourth Circuit has misinterpreted Title 18 U.S.C. § 924(c)(1), allowing three consecutive sentences totaling life plus a consecutive 420 months where each offense was based upon the firing of a single bullet at a target from each of three weapons, and, although there were multiple predicate conspiracies, no attempt was made to associate each firing with any particular predicate and where the objective of each firing was identical, not furthering one predicate as opposed to another?

2. Whether there can ever be a valid waiver of the right to trial by jury where there is no written waiver as required by Federal Rule of Criminal Procedure 23 and there is no oral colloquy with the defendant?

3. Whether, based on the facts of petitioners' case, there was a valid waiver of the right to trial by jury where the choice was between a biased jury or unbiased judge and the court never assured itself that the waivers were not the product of coercion?

4. Whether the petitioners made an adequate showing to warrant discovery on their selective prosecution claim where they established (1) that their post-September 11, 2001 indictment alleged pre-September 11, 2001 activities by young Muslim men; (2) the indictment alleged violation of the Neutrality Act under which no individual had been prosecuted for over one hundred years in the Fourth Circuit; and (3) they provided evidence of two non-Muslim groups that had violated the Neutrality Act in an open and notorious fashion and had not been prosecuted?

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## PETITION FOR A WRIT OF CERTIORARI

MASOUD AHMAD KHAN ("Khan"), SEIFULLAH CHAPMAN ("Chapman") and HAMMAD ABDUR-RAHEEM ("Hammad") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINION BELOW

The March 4, 2004, memorandum opinion of the United States District Court for the Eastern District of Virginia is published. 309 F. Supp. 2d 789 (E.D.Va. 2004); *see also* Petitioner Appendix [hereinafter "Pet. App."] 25-57. The September 1, 2006, opinion of the United States Court of Appeals for the Fourth Circuit is published. 461 F.3d 477 (4th Cir. 2006); *see also* Pet. App. 1-24. The United States Court of Appeals for the Fourth Circuit denied the appellants' petition for rehearing on September 29, 2006. Pet. App. 58.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 1, 2006. The Petitioners' request for rehearing en banc was denied on September 29, 2006. Pet. App. 58. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are contained in the Appendix. *See* Pet. App. 59-60.

## STATEMENT

Petitioners, along with a fourth co-defendant, Caliph Abdur Raheem ("Caliph"),[1] were charged in a 32 count superseding indictment with numerous conspiracies and substantive offenses after September 11, 2001, including conspiracy to violate the Neutrality Act, and post-

[1] Caliph was acquitted following the government's case-in-chief pursuant to Federal Rule of Criminal Procedure 29.

September 11th conspiracies to levy war against the United States, provide material support to Al-Qaeda, contribute services to the Taliban, contribute material support to Lashkar-e-Taiba, and other offenses. Petitioners were convicted after a bench trial before the Honorable District Court Judge Leonie M. Brinkema in the United States District Court for the Eastern District of Virginia.

**1. Facts Regarding Multiple Firearm Convictions**

As concerns Khan, the charged offenses all had to do with the decision to travel to Pakistan after September 11th and to train for three weeks at a camp run by a group named Lashkar-e-Taiba. The group was named a terrorist organization only after the defendants had returned to the United Sates. None engaged in any combat, none was deployed to any combat, none did anything but train and return home to their jobs.

In addition, the Indictment charged Khan and Chapman with several firearms offenses. As to Khan and Chapman, Counts 19 through 28 read as follows, after setting forth standard language:

| Count | Defendants | Date | Firearm |
|---|---|---|---|
| | Location | | Possessed, Used, Discharged |
| 19. | CHAPMAN | Sept. 2000 | AK-47 |
| | Pakistan | | used and discharged |
| 20. | CHAPMAN | Dec. 2000 | Saiga .30 |
| | Fairfax, VA | | possessed |
| 21. | CHAPMAN | June 2001 | AK-47 |
| | VA | | possessed |
| 22. | CHAPMAN | Sept. 2001 | AK-47, Machine gun, Rocket propelled Grenade |
| | Pakistan | | used and discharged |
| 24. | KHAN CHAPMAN | Oct. 2001 | AK-47 |
| | Pakistan | | used and discharged |
| 25. | KHAN CHAPMAN | Oct. 2001 | 12mm anti-aircraft gun |

Pakistan used and discharged

26. KHAN CHAPMAN Oct. 2001 machine gun
Pakistan used and discharged

27. KHAN CHAPMAN Oct. 2001 rocket propelled grenade
Pakistan used and discharged

28. CHAPMAN July 2002 AK-47
Fairfax, VA possessed

Each of these firearms offenses was alleged to have occurred "during, in relation to, and in furtherance of crimes of violence for which the defendants may be prosecuted in a court of the United States, including Counts 1 through 10 of this Superseding Indictment...."

At a bench trial, the district court found Khan guilty of three of the conspiracies and a portion of a fourth. Chapman was found guilty of two of the conspiracies. Over objection, the court sentenced both Khan and Chapman to consecutive terms of imprisonment under Title 18 U.S.C. § 924(c)(1). In doing so, the court did what she believed she was compelled to under the statute, stating that while the crimes were serious, "there are murderers who get far less time than this, and I have sentenced Al-Qaeda members who were planning real attacks on these shores for far less time . . . and I have to tell you that this is sticking in my craw." Pet. App. 22.

A significantly split panel of the Fourth Circuit upheld these sentences. Writing for the two-judge majority, Circuit Judge Duncan held that multiple convictions and sentences were permissible, finding that each of the firearms counts was supported by a separate predicate conspiracy.[2] Dissenting District Judge

[2] Along the way, the Fourth Circuit noted that this was a case where there were multiple convictions for predicate conspiracies. Therefore, the Fourth Circuit did not have to uphold the multiple firearms convictions and sentences on its unique precedent that a single predicate offense can support multiple firearms convictions, a view shared only by the Eighth Circuit and rejected by the D.C., Second, Fifth, Sixth, Seventh and Eleventh Circuits. Pet. App. 22.

Goodwin, sitting by designation, complained that the firearms counts had been lumped together in "shotgun style." Pet. App. 21. No exact dates were provided for the violations. *Id.* The location of each offense was "not specific, but rather lists the entire country of Pakistan." Pet. App. at 22. "The only distinction made relates to the type of firearm used." *Id.* Judge Goodwin noted that the trial judge found Khan's use of the weapons "highly limited" and "[a]ccording to the evidence, Khan fired only one bullet with each weapon at some form of target." *Id.*

While accepting the Fourth Circuit's rule that multiple "use" convictions can arise from one predicate offense, Judge Goodwin was constrained to point out that unless the "uses" are weighed and bounded by logic, the results can be absurd:

> Under the majority's reasoning, no boundaries exist for § 924(c) prosecutions. That is, a drug conspirator could pick up a gun, place it on the table to scratch his nose, pick it back up, and receive two § 924(c) sentences. An itchy nose could cost him an additional fifteen years. Likewise, a defendant could carry three dangerous weapons at one time, be convicted of three § 924(c) sentences, and receive a life sentence. Applying this statute without boundaries of reason and ordinary meaning leads to absurd results.

Pet. App. 23-24.

Judge Goodwin also faulted the majority for failing to require that each gun conviction be tied to a particular predicate, and ignoring the fact that "the evidence discloses only one objective Khan had when firing the weapons, which was to enhance his training in preparation for moving into Afghanistan." Pet. App. 24. Citing authority conflicting with the Fourth Circuit's interpretation, Judge Goodwin said that, "[w]here the 'uses' of a defendant have substantially the same objective, substantially similar effects on the predicate offense, and are proximate in time to one another, our

justification for sustaining multiple § 924(c) sentences does not exist." *Id.* Given that,

> [s]ustaining three § 924(c) sentences for Khan's convictions creates a result Congress surely did not intend. *Id.* . . . No evidence exists to suggest that each so-called "use" of the weapons had any kind of different effect on the predicate conspiracy. There is no evidence to determine the temporal proximity of the firing. The Indictment does not even attempt to distinguish the timing of each use, but merely lists each of Khan's uses as occurring in October 2001. []. From the evidence, it is impossible to tell if Khan's firing had separate objectives, different effects on the conspiracy, or occurred at different times not sufficiently proximate to justify multiple sentences.

Pet. App. 24.

**2. Facts Regarding Jury Waivers**

In October 2003, Chapman filed a motion requesting relief from prejudicial joinder, specifically requesting that his trial be severed from Khan's. The district court denied the motion.[3] In January 2004, Chapman filed a renewed motion for relief from prejudicial joinder or, in the alternative, to waive trial by jury. Both Hammad and Khan adopted Chapman's severance motion. The fourth co-defendant, Caliph, also filed a severance motion on similar grounds as that contained in Chapman's.

After denying Caliph's severance motion, the court conducted a lengthy colloquy on the jury waiver issue with him, in the absence of Khan, Hammad and Chapman. The court then accepted Caliph's signed waiver. At a later date, and after the government agreed

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[3] The essence of Chapman's severance motion was that the government intended to introduce evidence against Khan, including the allegation that Khan agreed to join the Taliban and Al-Qaeda and wage war against the United States, which was not admissible against Chapman if tried alone.

to waive jury as to the petitioners, the court entered jury waivers as to Khan, Hammad and Chapman without ever obtaining their written consent or conducting a colloquy regarding their decision to waive. Despite the lack of written waivers or oral colloquys, the Fourth Circuit upheld the petitioners' jury waivers.

**3. Facts Regarding Selective Prosecution**

Petitioners both pre- and post-trial moved the trial judge to order additional discovery to support their claims that their indictments were the product of selective prosecution. Petitioners provided the court with information regarding two separate non-Muslim groups that had openly violated the Neutrality Act (18 U.S.C. § 960)[4] yet had not been prosecuted by the government. The district court dismissed petitioners' motions for additional discovery and the Fourth Circuit upheld the district court's decision after conducting a *de novo* review. Pet. App. 18-19.

## REASONS FOR GRANTING THE WRIT

Regarding the consecutive Section 924(c) counts, the Fourth Circuit's rule, which here resulted Khan's sentence of life plus a consecutive 420 months for shooting at a target three times and fifty-five years of Chapman's sixty-five year sentence, creates absurd results which Congress clearly did not intend. It also conflicts with a number of other circuits which have required each gun count to be tied to and further a specific predicate felony. Given the great ambiguity in the statute (noted frequently by the courts), given the "plastic" way the government has justified different charging decisions in different factual settings, and given the varying interpretations brought to the task by different courts, this Court needs to act to resolve fundamental issues that are arising with great frequency in the lower courts.

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[4] Petitioners were charged with both violating the Neutrality Act and conspiring to violate the Neutrality Act.

The issue regarding the petitioners' jury waiver presents an important question of federal law that has not been but should be resolved by this court, and has been a source of conflict among the Circuits. The Fourth Circuit's holding, that petitioners' jury waivers were valid in the absence of written waivers and oral colloquys, appears to contradict that of at least the Tenth Circuit, which has refused to uphold a defendant's jury waiver in the absence of a written waiver and a court directed colloquy establishing that the defendant was made fully aware of the nature of the right and the circumstances and implications surrounding the waiver.

The Fourth Circuit's decision that petitioners did not meet the threshold requirement necessary to warrant further discovery on their selective prosecution claims despite their having established that non-Muslim groups had violated the Neutrality Act in a more open and bold manner without being prosecuted should be reversed. Petitioners made the exact showing they were required to under existing Supreme Court precedent yet were denied the very discovery necessary to bolster their claims. This Court should reverse and remand so that petitioners can have access to the only information available to establish that their indictment was the product of selective prosecution.

## I. THIS COURT SHOULD CLARIFY TITLE 18 U.S.C. § 924(c) TO HALT ITS WIDELY DISPARATE APPLICATION ACROSS THE CIRCUITS

### A. The Fourth Circuit's Holding That Virtually Simultaneous, Minimal Gun Use Not Tied To Any Particular Predicate, With No Separate Objective Or Effect On The Predicates, May Yield Multiple Convictions Under § 924(c) Conflicts With The Holdings Of Other Circuits.

The widely held view that Title 18 U.S.C. § 924(c) is ambiguous, resulting in vastly differing interpretations and frequently, and of necessity, invocation of the rule of

lenity, is addressed below. In this section, the petitioner focuses on just one such conflict. The Fourth Circuit's opinion in this case affirmed three convictions resulting in draconian consecutive sentences for "highly limited" target practice (three shots). The split decision rejected the petitioner's claim that the gun charges had not been linked to any particular predicate offense by the indictment, by the proof at trial, or by the district court in its findings. This, according to two members of the panel, was a "housekeeping matter" not required by Fourth Circuit law. Pet. App. 14.

Separately, the Fourth Circuit rejected an "episode" test for separate § 924(c) convictions. "Because Khan's four crime-of-violence convictions constitute separate predicate offenses, each may support a consecutive § 924(c) sentence without requiring the court first to enumerate 'uses' of firearms." Pet. App. 13-14.[5] Thus, no matter how close in time the gun uses may be (target practice over several days), nor whether they have the identical purpose (to learn how to shoot), nor whether they are the same conduct, nor whether they further the identical object of multiple, overlapping conspiracies,[6] separate shots will result in separate convictions in the Fourth Circuit so long as the government has charged separate predicate offenses.

This holding is in sharp conflict with the holdings of other Circuits. See *United States v. Finley*, 245 F.3d 199, 207 (2d Cir. 2001) ("The statute does not clearly manifest an intention to punish a defendant twice for continuous possession of a firearm in furtherance of simultaneous

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[5] According to the Fourth Circuit, so long as the crimes were separate under the test in *Blockburger v. United States*, 284 U.S. 299 (1938), there was no prohibition against pegging numerous gun uses to multiple offenses even if they happened simultaneously. Pet. App. 13-14.

[6] See discussion, *infra*. The multiple conspiracies alleged against Khan all contained the identical overt acts, covered the identical time period, and covered virtually the identical conduct.

predicate offenses consisting of virtually the same conduct."); *United States v. Wilson*, 160 F.3d 732, 748-50 (D.C. Cir. 1998) ("While there may be circumstances in which such offenses could support more than one § 924(c) charge – as where for example, the evidence shows distinct uses of the firearm, first to intimidate and then to kill – in the instant case there is no such distinction in time or place. However many crimes Louis may have committed by shooting Copeland, there was only one use (albeit a repeated use) of a firearm."); *United States v. Johnson*, 25 F.3d 1335, 1336-39 (6th Cir. 1994) (multiple guns and multiple predicates committed simultaneously lead to a single sentence).[7]

Likewise, the Fourth Circuit's refusal to require that each firearm use be tied to a particular predicate is contrary to the rule in other circuits. See *United States v. Cappas*, 29 F.3d 1187 (7th Cir. 1994) (dismissal of two of three firearms counts upheld where two of the guns alleged Count 2 as the predicate offense and the third gun alleged Count 2 and Count 11 as the predicate offenses. It was therefore impossible to tell if the jury had used the same predicate for each gun count); *United States v. Privette*, 947 F.2d 1259, 1263-4 (5th Cir. 1991) (remand for resentencing on only one § 924(c) count

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[7] *United States v. Casiano*, 113 F.3d 420, 425 (3d Cir. 1997) (upholding separate § 924(c) convictions for "virtually simultaneous[]" predicates); *United States v. Romero*, 122 F.3d 1334, 1343-44 (10th Cir. 1997) (same); *United States v. Cappas*, 29 F.3d 1187, 1190 (7th Cir. 1994) (using the *Blockburger* test to distinguish sufficiently separate predicates); *Khan*, *supra* (same); *United States v. Morris*, 43 Fed. Appx. 150, 157 (9th Cir. 2002) (unpublished opinion) (contemporaneity of predicates is irrelevant); *United States v. Fontanilla*, 849 F.2d 1257, 1258-59 (9th Cir. 1988) (upholding separate § 924(c) convictions for predicates in the same transaction); *United States v. Rahim*, 431 F.3d 753, 757-58 (11th Cir. 2005), *cert denied*, *Rahim v. United States*, 126 S. Ct. 1820, 164 L. Ed. 2d 552 (2006) (same); *United States v. Camps*, 32 F.3d 102, 106-109 (4th Cir. 1994). *C.f. United States v. Lucas*, 932 F.2d 1210, 1223 (8th Cir. 1991) (allowing multiple § 924(c) convictions for a single predicate under a "separate impulses" test).

where two were alleged and two drug offenses were alleged but indictment did not specify which gun went with which drug count – "We conclude that to avoid violating double jeopardy principles, each firearms offense must be sufficiently linked to a separate drug trafficking offense to prevent two convictions under § 924(c) on the same drug offense."); *United States v. Henry*, 878 F.2d 937, 934-44 (6th Cir. 1989) (consecutive section 924(c) sentences not allowed where each § 924(c) charge related to the same predicate offenses and each involved the same use of firearms). *Cf. United States v. Hamilton*, 953 F.2d 1344 (11th Cir. 1992) ("[M]ultiple § 924(c) convictions would have been proper if the Government had linked each gun count to Kelley's separate counts for possession of drugs. However because the § 924(c) counts were linked to a single conspiracy conviction, we hold that multiple sentences were improperly imposed.").

**B. Section 924(c)'s Legendary Ambiguity Has Resulted In A Patchwork Of Interpretations Which Need Unification.**

Nearly every United States Court of Appeals has grappled with the ambiguity of § 924(c), resulting in disparate interpretations and voluminous criticism by circuit judges. Because it was proposed as a floor amendment to the Gun Control Act of 1968, H.R. REP. No. 90-1577 at 1698, 90th Cong., 2d Sess., 7 (1968), 1968 U.S.C.C.A.N. 4410, 4412., no Congressional hearings or committee reports exist to guide the courts regarding § 924(c)'s original purpose. *Busic v. United States*, 446 U.S. 398, 405 (1980).[8]

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[8] Statements from the floor debate indicate § 924(c) was intended to be a direct deterrent to felons to "persuade the man tempted to commit a Federal felony to leave his gun at home," 114 CONG. REC. 22, 231-48 (1968) (Statement of Rep. Poff), but nothing from the record sheds light on the issue at hand. *See United States v. Lindsay*, 985 F.2d 666, 675 (2d Cir. 1993) ("Though meager, the legislative history confirms our conclusion as to the statute's ambiguity.").

Difficulty applying § 924(c) is frequent across the circuits. *See Finley*, 245 F.3d at 206 ("Even a brief review of the case law in this area shows that reasoned application of § 924(c)(1) can be extremely difficult. The 'wildly divergent interpretations' of the proper application of § 924(c)(1) can be seen in the numerous opinions and cases discussed in the divided en banc decisions...."); *id.* at 207-8 ("There is a widely-shared view that the statute's text is ambiguous....We very much doubt that Congress intended the statute to command such an illogical and exaggerated result."); *United States v. Johnson*, 25 F.3d 1335, 1338 (6th Cir. 1994) ("Our recitation shows that this hair-splitting sometimes leads to absurd results...."); *id.* at 1338-39 (Boyce, J., concurring) (quoting LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 93-94 (Heritage Press 1941), and explaining, "Like Alice, I too grow weary trying to solve riddles that seem to have no real answers... Section 924(c), when applied, often leads to puzzling results."); *Khan*, *supra* (Goodwin, District Judge, dissenting) ("Applying this statute without boundaries of reason and ordinary meaning leads to absurd results.").[9]

This ambiguity has influenced the courts' application of § 924(c). The Second and Fifth Circuits, for example, though disagreeing on the test for distinguishing units of § 924(c) prosecution, *see United States v. Wallace*, 447 F.3d 184, 189, n.2 (2d Cir. 2006), have noted § 924(c)'s ambiguity and apply the rule of lenity to invalidate second convictions where separate predicate offenses consist of "virtually the same conduct." *United States v. Finley*, 245 F.3d 199, 207 (2d Cir. 2001); *United States v.*

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[9] *Contra United States v. Luskin*, 926 F.2d 327, 376-77 (4th Cir. 1991) ("There is no ambiguity in section 924(c)."); *United States v. Morris*, 43 Fed.Appx. 150, 157 (9th Cir. 2002) (not reported) ("We find no such grievous ambiguity with respect to whether multiple § 924(c) counts can be supported by properly charged separate crimes although those crimes are part of a single course of conduct.").

*Phipps*, 319 F.3d 177, 187-88 (5th Cir. 2003) ("the statute's application compels us to apply the rule of lenity," noting § 924(c) "does not unambiguously authorize multiple convictions for a single use of a single firearm based on multiple predicate offenses."); *id.* at 188 (citing Second Circuit cases to "illustrate the difficulties in interpreting § 924(c)(1) and the not infrequent need to resolve ambiguities...."); *United States v. Lindsay*, 985 F.2d at 675 (2d Cir. 1993) ("When viewed as a whole, this firearms statute...is ambiguous as to the appropriate unit of prosecution.").[10] Due to this ambiguity concerning unit of prosecution, several Circuits are in the habit of reversing subsequent § 924(c) convictions where there is any question of its relation to a separate predicate. *See United States v. Cappas*, 29 F.3d 1187, 1189-90 (7th Cir. 1994) (where it was unclear how the counts were connected to the separate substantive crimes, the court assumed that all of the § 924(c) counts were linked to one conspiracy and reversed two of them); *United States v. Privette*, 947 F.2d 1259, 1261 (5th Cir. 1991) (where it was unclear whether the jury separated out the guns and tied each to a separate predicate crime, one of the § 924(c)(1) convictions was reversed); *United States v. Henry*, 878 F.2d 937, 939-40 (6th Cir. 1989) (one § 924(c) conviction was reversed because the government did not precisely set forth the relationship between the two predicate offenses and the two § 924(c)(1) counts). *Contra Khan, supra.*

### C. The Correct Interpretation Of § 924(c) Is A Question of Recurring Importance.

This Court last provided on-point guidance concerning § 924(c) in 1993. A six-to-three decision in *Deal v. United States* construed the statute to allow "second or

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[10] As discussed in the previous section, other circuits prove § 924(c)'s ambiguity not by exposition but by example, upholding multiple § 924(c) convictions with virtually simultaneous predicates.

subsequent" convictions arising from a single prosecution. 508 U.S. 129, 133-34 (1993). *Deal* provides no guidance concerning the propriety of consecutive § 924(c) sentences when the indictment fails to link any § 924(c) count to a specific felony, particularly when the felonies coexist and share the same criminal goal, and where the firearm use does not further one crime as opposed to another.

The circuits are thus split on the proper use of § 924(c) in these frequently recurring instances and several have noted the potential for mandatory, absurd sentencing results. The Justice Department, too, recognized the potential for charging disparities when Attorney General Ashcroft issued the following directive in 2003: "In cases involving three or more readily provable violations of 18 U.S.C.§ 924(c) in which the predicate offenses are crimes of violence, federal prosecutors shall, in all but exception cases, charge and pursue the first *two* such violations." Mem. To All Federal Prosecutors from A.G. John Ashcroft Re: Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing at 4 (Sept. 22, 2003) (emphasis added).

As the cases demonstrate, federal prosecutors do not consistently comply with this directive. The high frequency of firearms charges brings an added degree of urgency to this petition. According to the United States Sentencing Commission, 8,648 firearms convictions made up 11.9% of criminal cases in 2005, second only to drug trafficking and immigration.[11] Sourcebook of Federal Sentencing Statutes, United States Sentencing Commission, Table 3, Offenders in Each Primary Offense

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[11] This is the best publicly available information but does include convictions under additional firearms statutes.

Category (2005).[12] It is left to this Court to provide guidance to the circuits on application of § 924(c).

### D. The Fourth Circuit's Holding Is Incorrect And Has Resulted In A Monstrous Miscarriage Of Justice.

Khan was convicted of serious offenses, but in the main was guilty of traveling to Pakistan in the aftermath of September 11th, at the urging of a noted cleric, to participate in three weeks of training. He then returned to his normal life as a kitchen designer at Home Depot. For his conspiracy convictions, he received 10 years. For the § 924(c) counts, he received a sentence of life plus 420 months. He fired one shot from three weapons, each at a target. As noted, the district court had to grit her teeth to impose that sentence. Chapman's predicate offense for the gun counts was a conspiracy to violate the Neutrality Act by helping the Kashmiri's fight against what they perceived to be the unlawful occupation of their homeland by the Indian Army. Chapman's use of a firearm consisted of possessing a hunting rifle in Virginia and firing an AK-47 rifle at a paper target in Pakistan. He received a mandatory fifty-five year sentence for these gun offenses.

The Fourth Circuit was dead wrong in its application of § 924(c). With so many circuits bemoaning the ambiguities in that statute, at the very least the situation called for invocation of the rule of lenity. Judge Goodwin's observation that the Fourth Circuit's rule leads to absurd results, chief among them the death sentence imposed on Mr. Khan, is exactly right. Congress never intended the

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[12] Another reason guidance is so important in this area is that vast terms of punishment turn on how the statute is interpreted. Originally giving judges meaningful sentencing discretion, § 924(c) has evolved from an enhancement of "not less than one year nor more than ten years" for a first violation and "not less than 2 nor more than 25 years" for a subsequent violation, 18 U.S.C. § 924(c) (1968), to the harsh formula that resulted in Mr. Khan's life-plus mandatory minimum sentence.

statute to result in multiple sentences where there is no showing – nor could there be – that the firearm use furthers multiple virtually identical conspiracies. While each of the conspiracies for which Khan and Chapman were convicted was separate under *Blockburger* analysis, each contained identical factual allegations. Counts 2, 4 and 5 each adopted the lengthy "General Allegations" contained in the Count 1 conspiracy, as well as the lengthy "Overt Acts" contained in Count 1. None of the offenses added a single new factual allegation.

To our complaint that neither the indictment, nor the proof at trial, nor the government in argument, nor the district judge, made any effort to tie any particular gun use to any particular predicate offense, the Fourth Circuit blithely found assurance that no harm was done because this was a judge trial. "In this case, with a bench trial, we do not have to worry that the fact finder did not understand the law simply because she did not spell it out in detail." Pet. App. 14.[13] Given the widely divergent interpretations of the law as well as the ambiguity of the statute, that is wishful thinking and short sighted. Should the defendant's conviction on one of the conspiracies be overturned for some reason, which gun count gets vacated? Though hypothetical here, this issue may someday come back to haunt.

## II. THE CIRCUITS ARE IN CONFLICT OVER WHETHER THERE CAN EVER BE AN EFFECTIVE WAIVER OF TRIAL BY JURY IN THE ABSENCE OF A WRITTEN WAIVER AND COLLOQUY

Chapman, Hammad and Khan never submitted written jury trial waivers as required by Federal Rules of Criminal Procedure 23. *See* FED. R. CRIM. P. 23(a) ("...the trial must be by jury unless (1) the defendant waives a jury trial in writing...."); *see also* Pet. App. 60.

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[13] The fact is, no one could make such connections because it is impossible to do so.

Additionally, the district court did not advise the petitioners of their right to trial by jury, inform and assure them of the court's obligation to provide them with a "fair and impartial" jury, inquire as to the facts and circumstances surrounding their alleged decision to waive jury, nor conduct a colloquy to ensure that their waivers were voluntary, knowing and intelligent. Under similar factual scenarios, the Circuits have split as to what is necessary to establish a valid jury waiver.

### A. A Defendant's Waiver Of Jury Must Be Submitted Knowingly, Intelligently And Voluntarily.

A defendant's right to trial by an impartial jury is a fundamental constitutional right. *See* U.S. Const., Amend. VI; *see also Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Of the few decisions which are exclusively a defendant's, one is whether or not there shall be a jury trial. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Mentioning this right as an example, this Court recently said, "[C]ertain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." *Florida v. Nixon*, 543 U.S. 175, 187 (2004). Valid waivers of constitutional rights "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748 (1970). Because of the potentially serious consequences that attach to the waiver of fundamental rights, courts will "indulge every reasonable presumption against the loss of constitutional rights," *Illinois v. Allen,* 397 U.S. 337, 343 (1970), and "should 'not presume acquiescence in the loss of fundamental rights.'" *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972) *quoting Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292, 307 (1937).

Given the significance of the Sixth Amendment's trial by jury guarantee, a defendant can only waive his right to trial by jury if (1) the waiver is submitted in writing in

accordance with Rule 23(a) of the Federal Rules of Criminal Procedure; (2) the government consents to the jury waiver; (3) the trial court accepts the defendant's waiver; and (4) the defendant's waiver is made voluntarily, knowingly and intelligently. *See* Fed. R. Crim. P. 23(a); *see also Patton v. United States*, 281 U.S. 276, 312-13 (1930); *see e.g.*, *Adams v. United States*, 317 U.S. 269, 277-78 (1942).

### B. The Opinion Below Conflicts With The Tenth Circuit's Decision In *United States v. Robertson*, 45 F.3d 1423 (10th Cir. 1995).

Several circuits that have addressed the issue have found that purely technical violations of Rule 23(a)'s writing requirement do not, alone, require reversal but are a factor to be considered when evaluating the waiver's validity.[14] However, in the absence of a written waiver and colloquy with the defendant, the Circuits are split as to whether the record must contain reference to the defendant's actual understanding of the jury trial right and his personal desire to waive. *Compare United States v. Robertson*, 45 F.3d 1423 (10th Cir. 1995) *with United States v. Page*, 661 F.2d 1080 (5th Cir. 1981).

In addressing this issue, the Fourth Circuit recognized that the petitioners' jury waivers were entered without a signed written waiver and were accepted without any colloquy with the defendants on the record. Pet. App. 10-11. Despite the barren record, the Fourth Circuit provided:

> Defendants rely heavily on cases...in which other circuits have suggested that a Rule 23(a) waiver presented by counsel is inadequate, absent some other showing to satisfy an appellate court that it was actually knowing, voluntary, and intelligent.

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[14] *United States v. Hunt*, 413 F.2d 983 (4th Cir. 1969); *United States v. Mendez*, 102 F.3d 126, 129 (5th Cir. 1997); *United States v. Robinson*, 8 F.3d 418, 422 (7th Cir. 1993); *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984).

> In this circuit however, we have not imposed such a requirement. In *United States v. Hunt,* 413 F.2d 983 (4th Cir. 1969), we held that, while it would be "better practice" for a district judge to interrogate a defendant who claims through counsel that he wants to waive his jury trial right, nothing in the applicable case law, Rule 23(a) itself, or the Constitution requires it. *Id.* at 984.

Pet. App. 11.

The Fourth Circuit proceeded to find the record sufficient to establish a knowing, voluntary and intelligent waiver because "[t]he motions for waiver here were made in the alternative to the motions for severance as a calculated part of the defendants' trial strategy to prevent "'inflammatory and prejudicial evidence' from biasing a jury." Pet. App. 11. However, such a finding based only on the text of a defendant's pleadings appears to be in conflict with at least one other Circuit that has addressed the issue of a jury waiver founded on neither a defendant's written submission or oral colloquy. *Robertson*, 45 F.3d at 1423.

In *Robertson*, only the defendant's attorney signed a written waiver of her right to trial by jury. *Id.* at 1432. Though the court found this flaw alone not necessarily fatal to the waiver's validity, the court found nothing in the record to indicate that the waiver was entered knowingly, intelligently or voluntarily. *Id.* at 1433. The Tenth Circuit panel found that the district judge never inquired into the circumstances surrounding the waiver and never discussed those circumstances in the presence of the defendant. Despite the fact that the defendant's motion to waive jury stated that she had been "fully advised" of her right to trial by jury, the court found that it had "no way of knowing what constitutes a full advisement in the mind of counsel, and nothing in the record elucidates his subjective understanding of that phrase." *Id.* at 1433, n.10. The *Robertson* court vacated

the defendant's conviction and remanded for trial by jury. *Id.* at 1433.

In its decision below, and in contrast to *Robertson*, the Fourth Circuit seems to have adopted the position of the Fifth Circuit in *Page*, by upholding the petitioners' jury waivers in the absence of a written waiver and oral colloquy. In *Page*, the Fifth Circuit was similarly presented with a situation where a defendant was provided a bench trial in the absence of a signed jury waiver and any affirmative verbal consent by the defendant. *Id.* at 1081. Previously, and while the venire waited in the courtroom, the defendant's counsel informed the judge and government in a chambers conference without Page, that he and Page had "given considerable thought" to the jury issue and had decided to waive. *Id.* The judge then restated in the courtroom the defendant's request to waive jury and Page's attorney confirmed their position. No waiver was executed and no colloquy was conducted. *Id.* The *Page* court nevertheless affirmed the defendant's convictions on the ground that Page was an educated man who did not object upon hearing his attorney waive his right to trial by jury. *Id.* at 1082.

The current split in the circuits allows the practice of accepting waivers of the Sixth Amendment's right to trial by jury in the absence of a written waiver and colloquy to continue unabated in at least the Fourth and Fifth Circuits. Thus, this issue needs to be authoritatively decided by this Court.

### C. This Court Should Resolve The Split In The Circuits By Holding That Before A Jury Waiver Can Be Found Valid The District Court Must Conduct A Colloquy Directly With The Defendant And Require A Written Jury Waiver.

This Court has yet to clearly establish that trial courts must conduct a colloquy with defendants, or inform them of the jury's role in the guilt and sentencing

phases of a trial, before accepting a valid jury trial waiver. Currently, this Court only requires the waiver be submitted voluntarily, knowingly and intelligently with adequate understanding of the circumstances and consequences of the waiver. *See Brady*, 397 U.S. at 748. However, given the relative difficulty in determining what constitutes a valid understanding of a jury waiver's implications and whether any waiver of an important constitutional right is given voluntarily, knowingly and intelligently, it is submitted that this Court should hold that a jury waiver cannot be found valid if submitted in the absence of a signed written waiver and colloquy.

By analogy, reference is made to Fed. R. Crim. P. 11 (Pleas), which requires a district court to address the defendant personally, on the record, by informing the defendant of the various rights being abandoned via the guilty plea and directly questioning the defendant in order to ensure that his plea of guilty is given voluntarily. *See* Pet. App. 60 (providing relevant text of Rule 11(b)(1)-(b)(2)). It is submitted that for the same reasons the law currently requires a direct colloquy with a defendant before the acceptance of his guilty plea, this Court should also require a similarly precise colloquy with a defendant before the acceptance of his waiver of an impartial jury.[15] As this Court has previously held:

> Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of

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[15] *See Wyatt v. United States*, 591 F.2d 260, 266 n.10 (4th Cir. 1979) ("That the procedures for guilty pleas and jury waivers should probably be brought into general conformity has been noted by courts, E.g. *United States v. Straite*, 425 F.2d 594, 595 (D.C. Cir. 1970), and commentators, E.g., 8A MOORE'S FEDERAL PRACTICE, P23.03(2) (2d ed. 1978).)".

> government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

*Patton*, 281 U.S. at 312-13.

The principles espoused in *Patton* today stand substantially weakened by the withering of the written waiver requirement and colloquy process in determining the validity of a jury waiver. As it currently stands, some circuits have upheld a defendant's jury waiver in the absence of his written request or his verbal consent while others have not. Absent a colloquy requirement, the power to waive jury is currently permitted, in some circuits, to exist in the hands and mind of a defendant's attorney, to be upheld on a record completely devoid of a defendant's affirmative waiver, and without any evidence of the defendant's understanding of the right being abandoned or the motivation and circumstances underlying his waiver.[16] Such a status of the law, differing between Circuits, should not be permitted to continue and can easily be resolved by this Court. Therefore, this Court should grant certiorari in order to provide a clear constitutional standard for the finding of a valid waiver of jury.

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[16] The instant case, for example, presents a factual situation that would warrant remand for trial by jury in the Tenth Circuit but not in the Fourth or Fifth Circuits.

## III. EVEN IF THIS COURT HOLDS THAT A DEFENDANT'S WAIVER OF TRIAL BY JURY CAN BE FOUND IN THE ABSENCE OF A WRITTEN WAIVER AND COLLOQUY, THE WAIVERS IN THE INSTANT CASE WERE INVALID BECAUSE CHAPMAN AND HAMMAD WERE ONLY PROVIDED WITH AN UNCONSTITUTIONAL CHOICE BETWEEN A BIASED JURY OR FAIR JUDGE AND THE COURT NEVER ENSURED THAT KHAN'S WAIVER WAS UNCOERCED

At the time of Chapman's and Hammad's severance motions, the district court was aware and the Fourth Circuit accepted, that petitioners' believed, that absent a severance, they could not obtain an impartial jury and that there may have been pressure from the government and other co-defendants for petitioners to waive jury. On January 20, 2004, the district court held a hearing on Caliph's severance and discovery motions, where only the government, Caliph and his attorney were present. After ruling against Caliph on severance, the court then conducted a colloquy with Caliph and his attorney to ensure that his waiver was valid in that it was entered voluntarily, knowingly and intelligently. Specifically, the court went out of its way to disabuse Caliph of his belief he would not be tried by an impartial jury. *See* Pet. App. 61.

Furthermore, the court ensured Caliph was not waiving jury *only because* his severance motion had been denied and that his decision was not the result of pressure by the government or his co-defendants. Pet. App. 61. Convinced that Caliph had been fully advised of his rights, understood that an impartial jury was attainable, and that he was not waiving jury because of the denial of his severance motion or coercion by his co-defendants or the government, the court accepted Caliph's waiver as valid and had him sign and submit a written jury waiver.

Chapman, Khan and Hammad, however, were never presented with a written jury waiver and the district court never spoke directly to them about what the right to trial by jury entails or their decision to waive despite being put on notice of their concerns – the same concerns the court had addressed during Caliph's colloquy.

### A. Chapman And Hammad Were Never Assured Of Their Right To An Impartial Jury.

After denial of their severance motions, Chapman and Hammad were left with choosing between proceeding to a jury trial with Khan, or waiving jury and having a bench trial with Khan. Chapman and Hammad, as evidenced in their pleadings, did not believe that the district judge would or could provide them with a fair and impartial jury as required by the Sixth Amendment to the Constitution as long as the allegations Khan were a part of their trial. Unlike her treatment of Caliph, the district judge never disabused petitioners of that belief and instead accepted their unwritten and unexamined jury waivers on the basis that they did not believe an impartial jury would be impaneled. Importantly, the district judge never told the petitioners she had an obligation under the Sixth Amendment to provide them an impartial jury nor did she inform them that if it appeared that an impartial jury could not be attained she would reconsider their severance motions.[17]

Thus, the district court entered a waiver of a fundamental constitutional right, trial by jury, without ever guaranteeing that an impartial jury would be provided. However, before there can be a valid waiver, a defendant must be provided with the very right allegedly being waived. In other words, a defendant cannot waive

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[17] In fact, the district judge made clear that she had made a final determination that a severance would not be granted and that Chapman and Hammad would be tried with Khan. The district judge even went so far as to tell Chapman's counsel to stop raising the severance issue. Pet. App. 62.

a choice or right that has never been provided. Under the Sixth Amendment, a defendant cannot be presented only with the option of an unconstitutional jury. Forcing a Hobson's choice upon a defendant, between a biased jury and fair judge, does not support the finding of a valid waiver of the right to trial by jury.

The Fourth Circuit, hearing this issue on appeal, implied in its decision that the choice facing the petitioners – choosing between a biased jury or fair judge – was a valid choice and thus warranted upholding the jury waiver. *See* Pet. App. 11-12 ("Criminal defendants must frequently choose from among less than desirable alternatives. The fact that defendants would have preferred severed jury trials does not make their choice of a non-severed bench trial over a non-severed jury trial unknowing or involuntary."). It is respectfully submitted that while it is true that defendants often must choose among several alternatives, the Sixth Amendment guarantees that an unfair and biased jury will not be one of them.

The Fourth Circuit also found support for its holding in that regards to the denial of severance, the petitioners could not show prejudice because the district judge "meticulously sifted the evidence" and did not prejudice Chapman and Hammad based on the evidence admitted solely against Khan. Pet. App. 10. However, the Sixth Amendment does not guarantee trial by an impartial trier of fact, judge or jury, but specifically requires trial by an impartial *jury*. Therefore, it is submitted that whether the trial judge was fair and impartial is irrelevant to the consideration of whether the petitioners were afforded their right to an impartial jury. Because an impartial jury was never provided or offered, their waivers cannot be found to have been knowing, intelligent or voluntary.

**B. The Court Never Ensured That Khan's Waiver Was Voluntary And Not The Product Of Duress And Coercion.**

The failure of the court to conduct an inquiry of Khan concerning jury waiver is significant for reasons separate from those pertaining to Chapman and Hammad. First, it was clear that the government's willingness to waive jury was an all or nothing proposition. Unless all defendants agreed, there would be no waiver for any. Chapman, Hammad and Caliph each believed that they could not get a fair trial if evidence admissible against Khan (alleged ties to Al Qaeda, evidence concerning the Taliban) were used at their trials. As a result, there was clear pressure on Khan to agree to the waiver, not because it benefited him, but to accommodate his co-defendants and the government.

The court was obviously concerned about the potential pressure to waive jury, enough so that earlier, it had questioned Caliph about whether his decision to waive was based upon pressure from the co-defendants. Pet. App. 61. But Khan did not get the benefit of any such inquiry. Had there been such an inquiry, it may well have yielded information that would have led the trial court to reject the waiver.

Given the very personal nature of that decision, no court should ever assume that the defense lawyer's request to forego jury reflects the client's intelligent or un-pressured decision. Inquiry by the court should be required. Here, because the district court was already on notice of the possibility of coercion, she was under an absolute duty to assure herself that Khan was not succumbing to pressure. Absent a finding on the record that Khan's waiver was not the product of coercion, this Court should find Khan's waiver invalid and remand for trial by jury.

## IV. PETITIONERS MADE AN ADEQUATE SHOWING TO WARRANT DISCOVERY ON THEIR SELECTIVE PROSECUTION CLAIM

The petitioners alleged that their indictment was the product of selective prosecution on the part of the government. Specifically, the petitioners presented evidence of other groups that had allegedly commenced expeditions against nations with which the United States was at peace, in violation of the Neutrality Act (18 U.S.C. § 960), who had not been prosecuted for their well-documented actions. To further investigate their allegation, the petitioners requested both pre- and post-trial, that the district court order additional discovery with regard to their selective prosecution claim. The district court's subsequent denial of their discovery request, and the Fourth Circuit's subsequent affirmation, in light of petitioners' more than adequate showing of disparate treatment towards non-Muslims, was error.

### A. The Standard For Discovery On A Selective Prosecution Claim.

The equal protection component of the Fifth Amendment's Due Process Clause ensures that "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *United States v. Armstrong,* 517 U.S. 456, 470 (1996); *quoting Oyler v. Boles,* 368 U.S. 448 (1962). In order to obtain discovery in support of a selective prosecution claim, a defendant "must produce 'some evidence' making a 'credible showing' of both discriminatory effect and discriminatory intent." *United States v. Olvis*, 97 F.3d 739, 743 (4th Cir. 1996). This Court has provided a slightly different showing by finding that a defendant must make "a credible showing of different treatment of similarly situated persons." *Armstrong*, 517 U.S. at 470. Under either standard, the petitioners submit that they made an adequate showing to warrant additional discovery with regard to their selective prosecution claim.

Discriminatory purpose is shown by government action motivated "at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Wayte v. United States*, 470 U.S. 598, 610 (1985). Discriminatory effect is often shown by the presentation of evidence of other groups of individuals who have committed similar underlying conduct without being prosecuted. *Armstrong*, 517 U.S. at 465. Given that the evidence and documentation needed to present a sufficient selective prosecution complaint is in the hands of the government, a defendant often needs to obtain additional discovery regarding their specific claim. In those circumstances, as noted above, a defendant must show "some evidence tending to show the existence" of discriminatory intent and discriminatory effect in order to trigger a right to discovery. *Id.* at 468.

**B. Petitioners Made An Adequate Showing To Warrant Additional Discovery Where They Presented Evidence That The Government Had Not Prosecuted Other Non-Muslim Groups Who Had Openly Violated The Neutrality Act.**

In support of their request for discovery on their selective prosecution claim, the petitioners provided an adequate basis for the court to grant their motion. First, the petitioners established that their indictment alleged conspiracies that began before the terrorist attacks of September 11, 2001 ("9/11") and was obtained post-9/11, referring to the very same conduct that went unindicted prior to the 9/11 attacks.

Second, petitioners provided research that at the time of their trial, no Neutrality Act prosecutions had occurred in the Eastern District of Virginia for over one hundred years. In fact, there had been no Neutrality Act prosecutions in the entire Fourth Circuit in the preceding one hundred years. Third, the petitioners provided evidence regarding two separate and distinct non-Muslim groups that had violated the Neutrality Act in an open

and notorious fashion yet had escaped prosecution for their acts. Specifically, the petitioners directed the district judge to the Cambodian Freedom Fighters ("CFF") and the Irish Republican Army ("IRA").

As part of their evidence, petitioner's provided documentation regarding the CFF's attack against the Cambodian capital of Phnom Penn in November 2000, which involved the use of B-40 rockets and rifles, as well as over twenty Cambodian-Americans that traveled overseas from the United States for the specific purpose of carrying out the attack. Additionally, petitioners drew the court's attention to Yasith Chun, the leader of the U.S. based CFF, who had not only openly called for continued attacks on Cambodia but had gone so far as to say that "the U.S. has never given [CFF] the red light" and "If I'm a terrorist, then George Bush is a terrorist too." Despite this well-documented Neutrality Act violation, CFF leaders were official guests at dinners with President Bush, were appointed as fundraisers for the Republican Party and were solicited for campaign contributions.

Petitioners also referenced in their motions the well-documented activities conducted by the Irish Republican Army ("IRA") on American soil for the purpose of driving the British out of Northern Ireland. Despite the government's refusal to designate the IRA or Sinn Fein as terrorist organizations, the fact still remains that Irish Catholics in the United States have provided arms and money to those two groups for the purpose of conducting expeditions against England, a country with which the United States is at peace.

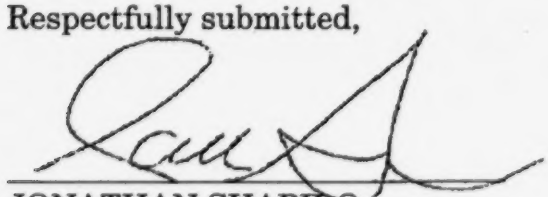
Therefore, the petitioners provided overwhelming evidence in their pre- and post-trial pleadings of other groups guilty of more substantive and egregious acts than those charged in the instant indictment but that were not prosecuted. Such a showing, in and of itself, was more than sufficient to warrant the disclosure of additional discovery regarding the government's sudden interest in

prosecuting Muslim's for crimes that went unprosecuted in the same jurisdiction for over one hundred years. *See Armstrong*, 517 U.S. at 469 ("The vast majority of the Courts of Appeals require the defendant to produce *some* evidence that similarly situated defendants of other races *could have been prosecuted, but were not*, and this requirement is consistent with our equal protection case law.") (Emphasis added). Given such a showing, the court erred by not granting the petitioners' request for additional discovery, particularly when the information was in the sole possession of the government and was vital to substantiate the petitioners' selective prosecution claim. Fifty-five years of Mr. Chapman's sixty-five year sentence were directly connected to his conspiracy to violate the Neutrality Act conviction. Accordingly, this Court should remand so that further discovery can be provided to the petitioners with regard to their selective prosecution claim.

## CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,



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United States Court of Appeals, Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Masoud Ahmad KHAN, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Seifullah Chapman, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Hammad Abdur-Raheem, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Masoud Ahmad Khan, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Seifullah Chapman, Defendant-Appellant.
United States of America, Plaintiff-Appellant,
v.
Hammad Abdur-Raheem, Defendant-Appellee.
Nos. 04-4519 No. 04-4520 No. 04-4521 No. 05-4811 No. 05-4818 No. 05-4893.
Argued: May 25, 2006.
Decided: Sept. 1, 2006.

Before WIDENER and DUNCAN, Circuit Judges, and JOSEPH R. GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed in part; remanded in part by published opinion. Judge Duncan wrote the majority opinion, in which Judge Widener joined. Judge Goodwin wrote a separate opinion concurring in part and dissenting in part.

OPINION

DUNCAN, Circuit Judge:

Defendants Masoud Khan ("Khan"), Seifullah Chapman ("Chapman"), and Hammad Abdur-Raheem ("Hammad") appeal their convictions after a bench trial on various counts related to a conspiracy to wage armed conflict against the United States and a

conspiracy to wage armed conflict against a country with whom the United States is at peace. Khan and Chapman also appeal those portions of their sentences related to multiple violations of 18 U.S.C. § 924(c). The government cross-appeals the district court's decision to sentence Hammad significantly below the range recommended by the Sentencing Guidelines.

For the reasons explained below, we affirm the convictions of all three defendants as well as the sentences of Khan and Chapman. However, we reverse Hammad's sentence as unreasonable and remand to the district court for re-sentencing.

Because of the lengthy and complex background of this case, we initially describe the facts and procedural history generally applicable to all of the defendants. Facts specific to each defendant will be set forth in the discussion of the arguments of each.

I.

Between 1999 and September 11, 2001, Khan, Chapman and Hammad attended the Dar al Arqam Islamic Center in Falls Church, Virginia where Ali Timimi ("Timimi"), a primary lecturer, spoke of the necessity to engage in violent jihad [FN1] against the enemies of Islam and the "end of time" battle between Muslims and non-Muslims. Several of the attendees, including Chapman and Hammad, organized a group to engage in activities in preparation for jihad.

FN1. Jihad is "a holy war undertaken as a sacred duty by Muslims." Webster's Unabridged Dictionary 1029 (2nd. ed.2001).

In the spring of 2000, members of the group began simulating combat through paintball exercises [FN2] and practices at firing ranges. By early summer, the group was meeting every other weekend. Chapman, Hammad, and others brought AK-47 style rifles to paintball training and also practiced marksmanship. Members were required to follow three rules: don't tell anyone, don't bring anyone, and invoke the Fifth Amendment right against self-incrimination if questioned by the police.

FN2. Paintball is a game that simulates military combat in which players on one team try to eliminate players on the opposing team by shooting capsules of water-soluble dye at them from air powered rifles.

Because Hammad and Chapman had prior military experience, they assisted in leading the paintball drills and conducting the training. Chapman eventually took over and increased the drills' intensity. Chapman told the group that members were going to learn to fight; he enforced Draconian training and imposed physical punishment for infractions of rules that were out-of-character for a recreational *484 paint-ball pastime. For example, being made to push a car in neutral was the punishment meted out for tardiness. The group also learned combat skills, such as how to avoid a helicopter attack, that appear inconsistent with a recreational pursuit.

Members of the group had ties to Lashkar-e-Taiba ("LET"), the military wing of a Pakistani organization initially founded to conduct jihad against Russians in Afghanistan. Between 1999 and 2003, LET primarily focused on expelling India from Kashmir. Both through its website and through other means, LET proclaimed its support for and involvement in a number of violent acts, particularly against India. In addition, LET advertised that it provided free jihad training camps in Pakistan.

One member of the paintball group, Mr. Hamdi, openly discussed wanting to go to fight in Kashmir and ultimately die as a martyr in combat. Hamdi traveled to Pakistan in August 2000 and was admitted to the LET camps. While there, he fired on Indian positions in Kashmir. Upon his return, he rejoined the paintball group and informed the others about LET's mission to destroy India, Israel, and the United States.

In September 2000, FBI agents visited Chapman and asked him about the paintball activities. After this interview, members of the group discussed whether they should continue in light of the government's knowledge of their activities. They decided to do so, but with heightened secrecy.

Seeking more intense and realistic fighting experience in the summer of 2001, Chapman traveled to the LET camps in Pakistan. While there, he participated in training and fired various rifles and handguns, including at least one automatic weapon. During that time, Chapman also met an LET official in Pakistan by the name of Singh. In 2002, Singh tried to purchase over the internet a wireless video module and a control module for use in an unmanned aerial vehicle ("UAV"). Singh selected an airborne video system with a camera and transmitter able to transmit video

images from a UAV back to a receiver from as far as 15 miles away. The video camera could be used in military reconnaissance and in helping aim artillery and other weaponry across enemy lines. Singh placed his order from England, but the vendor was unable to confirm the overseas credit card. Chapman and Khan assisted Singh in completing the purchases. In the summer of 2002, Singh visited Virginia, staying first with Chapman and then with Khan.

The terrorist attacks of September 11, 2001, affected both the focus of the paintball group and the relationship of its members to the Dar al Argam Islamic Center. That night, Timimi argued that the attacks should not be condemned. He was thereafter not invited to lecture at Dar al Argam, and the tapes of his speeches were destroyed. However, on September 16, 2001, Timimi met with the paintball group, including Khan and Hammad, at a member's house. Chapman, still at the LET camps, was not present. Timimi said that the September 11 attacks were justified and that it was the obligatory religious duty of those present to defend the Taliban against the American troops that were expected to invade Afghanistan in pursuit of Al-Qaeda. The discussion focused on training at the LET camps as necessary preparation to fight with the Taliban against the United States. Several of the members, including Khan, expressed their intent to train at the LET camps and to fight in Afghanistan after their training was complete. For purposes of their travel, they agreed that Khan would be their "emir," or leader.

*485 Khan trained at the LET camps for approximately six weeks. During that time, he traveled through four different camps and received training in commando tactics, reconnaissance, hand-to-hand combat, and survival skills. He received instructions on and used weapons, including AK-47 automatic rifles, machine guns, anti-aircraft guns, rocket-propelled grenades, and mines. He performed sentry duty and routine maintenance tasks for LET. During this time, Khan left the camps on personal business at least once and returned shortly thereafter.

American troops began a ground war against the Taliban on or about October 20, 2001. By mid-November 2001, American and allied troops were defeating Taliban forces throughout northern Afghanistan. On November 13, 2001, the Taliban withdrew from the Afghan capital of Kabul, and forces allied with the United

States took control of the city. By November 15, Taliban forces had retreated to Kandahar. In November 2001, while at LET camp, Khan learned through radio reports that American forces were quickly defeating the Taliban in Afghanistan. Further, he learned that Pakistan had closed its border with Afghanistan and that LET would not facilitate his travel there. Moreover, Pakistani authorities were aggressively removing foreigners from the camps. As a result, Khan left the camps in the fall of 2001 without ever having reached Afghanistan.

The government's investigation into the activities of Khan, Chapman, Hammad, and their colleagues became public in February 2003, when a search warrant was executed at Timimi's house. On March 24, 2003, the FBI approached Caliph Abdur Raheem ("Caliph"), one of the paintball members who was tried with defendants in this case and acquitted, and obtained a statement from him. Caliph told the FBI that paintball was used for jihad training and that the reason the trainees had acquired AK-47-style rifles was that they were the type of weapon used overseas. When Hammad learned of the admissions, he called a colleague with the "bad news" that Caliph had "cracked."

As a result of the government's investigation, Hammad, Chapman, and Khan, along with eight others-Caliph, Donald Surratt II, Yong Ki Kwon, Muhammed Aatique, Khwaja Hasan, Randall Todd Royer, Ibrahim Ahmed Al-Hamdi, and Sabri Benkhala-were indicted in June 2003 for various offenses concerning a conspiracy to engage in military expeditions against India and the United States.

Surratt, Kwon, Aatique, and Hasan all pleaded guilty before trial and cooperated with the government. As a result of their assistance, a superseding indictment was returned against the remaining seven defendants in September 2003.[FN3] Because of his attempts to fight with the Taliban, Khan was charged with a conspiracy to levy war against the United States, a conspiracy to provide material support to Al-Qaeda, and a conspiracy to contribute services to the Taliban. Neither Chapman nor Hammad was charged with these conspiracies.

FN3. Because the government proceeded against all seven defendants in a single thirty-two count indictment, not every count of the indictment applied to each defendant.

In January 2004, Royer and Hamdi pleaded guilty. Benkhala was tried separately and acquitted. The government proceeded against Caliph, Chapman, Hammad, and Khan. Chapman and Hammad moved to have their trial severed from Khan's, arguing that evidence that would be presented against Khan would prejudice their right to a fair trial. The district court denied the motion for severance. Chapman, Hammad, and Khan then moved *486 for a bench trial, which the district court granted.[FN4]

FN4. Caliph moved separately for severance of his trial from Khan's and, in the alternative, for a bench trial. His motion for severance was denied, but his motion for a bench trial was granted.

At trial, the government presented the statements made by Caliph to the FBI that the paintball activities were intended to be training for jihad, and that the trainees had obtained AK-47 style weapons because that was the type of weapon used in combat overseas. After the government's presentation of evidence against him, Caliph moved for an acquittal pursuant to Federal Rule of Criminal Procedure 29. The district court granted that motion. As a result, Caliph never testified, and his co-defendants had no opportunity to cross-examine him concerning his statements.

At the conclusion of the bench trial, the district court wrote a comprehensive opinion detailing the evidence against the three remaining defendants and referencing the wealth of cumulative evidence of record. Khan was acquitted on four counts and convicted on the following eight counts: (1) one count of conspiracy to enlist in armed conflict against the United States in violation of 18 U.S.C. §§ 371, 2390; (2) one count of conspiracy to levy war against the United States in violation of 18 U.S.C. § 2384; (3) one count of conspiracy to contribute services to the Taliban in violation of 50 U.S.C. § 1705; (4) one count of conspiracy to contribute material support to LET, knowing and intending that it was to be used in preparation for and in carrying out a conspiracy to kill or injure persons in a foreign country with which the United States is at peace in violation of 18 U.S.C. § 2339A; and (5) four counts of conspiracy to use firearms in relation to a crime of violence in violation of 18 U.S.C. § 924. Chapman was acquitted on two counts, but convicted on the following five counts: (1) one count of conspiracy to violate the

Neutrality Act (18 U.S.C § 960); (2) one count of conspiracy to contribute material support to LET, knowing and intending that it was to be used in preparation for and in carrying out a conspiracy to kill or injure persons in a foreign country with which the United States is at peace in violation of 18 U.S.C. § 2339A; and (3) three counts of conspiracy to use firearms in relation to a crime of violence in violation of 18 U.S.C. § 924. Hammad was acquitted on four counts, but convicted on the following three counts: (1) one count of conspiracy to violate the Neutrality Act (18 U.S.C § 960); (2) one count of conspiracy to contribute material support to LET, knowing and intending that it was to be used in preparation for and in carrying out a conspiracy to kill or injure persons in a foreign country with which the United States is at peace in violation of 18 U.S.C. § 2339A; and (3) one count of conspiracy to use firearms in relation to a crime of violence in violation of 18 U.S.C. § 924. The district court noted that it included in its opinion only a fraction of the facts supporting the convictions and that it could have, with time, included four times as many facts in its opinion in support of its conclusions.

Before the initial appeals of these convictions were briefed, the case was remanded for re-sentencing in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). At re-sentencing, the district court chose to sentence Hammad well below the range recommended by the Sentencing Guidelines, concluding that Hammad's sentence should be similar to the sentence of Surrat because, in the district court's opinion, Surrat and Hammad were similarly situated.

*487 Khan, Chapman, and Hammad now timely appeal their convictions and sentences on various grounds. The government timely cross-appeals Hammad's sentence, arguing that it constitutes an unreasonable variance from the recommended Sentencing Guidelines range. We first address each defendant's individual argument that, with respect to one or more counts of the indictment, there was insufficient evidence to support his conviction. We next address the arguments that apply to the defendants as a group concerning the validity of their convictions and sentences. We conclude by addressing the government's cross-appeal.

II.

[1] Each of the defendants first challenges his convictions, arguing that they were not supported by sufficient evidence. When we assess the sufficiency of the evidence of a criminal conviction on direct review, "[t]he verdict of [the] jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942). We address each argument in turn.

A. Khan's Convictions

1.

[2][3][4] Khan argues that there was insufficient evidence presented at trial to support his convictions for (1) Count One, conspiracy to enlist in armed conflict against the United States in violation of 18 U.S.C. § § 371, 2390; (2) Count Two, conspiracy to levy war against the United States in violation of 18 U.S.C. § 2384 and (3) Count Four, conspiracy to contribute services to the Taliban in violation of 50 U.S.C. § 1705(b). We disagree.

The essential elements of Count One, as applied to Khan, are (1) a conspiracy (2) to enlist or engage within the United States or any place subject to the jurisdiction thereof, (3) with intent to serve in armed hostility against the United States. 18 U.S.C. § § 371, 2390. The essential elements of Count Two are (1) a conspiracy (2) to over-throw, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof. 18 U.S.C. § 2384. The essential elements of Count Four are (1) a conspiracy (2) to willfully make or receive any contribution of funds, goods, or services, to or for the benefit of the Taliban. 50 U.S.C. § 1705(b); 31 C.F.R. § 545.201-545.208.

[5][6][7] There was sufficient evidence to support the district court's findings of guilt on all of these counts. When the group members were meeting and discussing going to Afghanistan to aid the Taliban against the United States, Khan exhorted the others to go with him to Afghanistan because "the cowards and the weak hearted are the first to run away." J.A. 1013. Khan did, in fact, travel to Pakistan to engage in training in the LET camps, and

there was evidence that Khan intended to go to Afghanistan to fight with the Taliban against the United States after training. Khan was also selected as the leader of the group when they arrived in Pakistan. All of the group members that Khan led directly testified that they intended to engage in armed hostilities against the United States. The district court found their testimony to be credible; indeed, it was unrebutted. We conclude that this evidence amply supports the finding that *488 Khan was guilty of Counts One, Two, and Four.[FN5]

FN5. Khan also challenges his conviction under Count One on an additional ground, arguing that, as applied to him, Count Eleven and Count One were identical offenses. A defendant cannot, of course, be punished for two crimes that constitute the "same offense." *Rutledge v. United States,* 517 U.S. 292, 297, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). "If 'the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' " *Id.* (quoting *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). In this case, Count One entailed a conspiracy to violate 18 U.S.C. § 2390 by enlisting to serve in armed hostility against the United States, while Count Eleven involved a violation of 18 U.S.C. § 924(*o*), conspiracy to possess and use firearms in connection with a crime of violence. Count One required that Khan engage in armed hostility, but Count Eleven did not. *Compare* 18 U.S.C. § 2390 *with* 18 U.S.C § 924(*o*). Count Eleven required the use of a firearm, but Count One did not. *Compare* 18 U.S.C. § 2390 *with* 18 U.S.C § 924(*o*). Because each Count required proof of a fact that the other did not, they are not the same offense, and the district court did not err in punishing Khan separately for each count.

2.

[8] Khan next argues that there was insufficient evidence to support his conviction under Count Five, conspiracy to contribute material support to LET, knowing and intending that it was to be used in preparation for and in carrying out a conspiracy to kill or injure persons in a foreign country with which the United States is

at peace, in violation of 18 U.S.C. § 2339A. While he concedes that he provided material support to LET, Khan contests that there was sufficient evidence to demonstrate that he knew that LET was intent on committing acts of murder or injury to others. We disagree.

The evidence reflects that LET broadly disseminated its goals for the destruction of India, America, and Israel on its web site and elsewhere. Khan was personally acquainted with Singh, an LET official, whom he assisted in purchasing paramilitary equipment. Even if Khan remained unaware of the nature of LET's activities before training in its camps, he was certainly aware of it by the time he returned to them after leaving temporarily because the LET camps were full of descriptions of LET's violent exploits. We therefore conclude that sufficient evidence was introduced for a rational trier of fact to find the essential elements necessary for Khan's conviction under Count Five. [FN6]

FN6. Khan also challenges his convictions under Counts Eleven, Twenty-Four, Twenty-Five, and Twenty-Seven, conspiracy to use firearms in relation to a crime of violence, in violation of 18 U.S.C. § 924, for each of the four counts discussed above. Khan acknowledges that he used a firearm in relation to those counts. Because, as discussed above, there was sufficient evidence to support his conviction on those counts, there was sufficient evidence to support his conviction for the related firearms counts.

B. Chapman's Convictions

1.

[9] The district court found Chapman guilty of Count One, conspiracy to violate the Neutrality Act, which makes it a crime to knowingly begin[ ] or set[ ] on foot or provide[ ] or prepare[ ] a means for or furnish[ ] the money for, or take[ ] part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace.

*489 18 U.S.C. § 960. The district court found that "Chapman and [Hammad] furthered the conspiracy by training co-conspirators in combat skills through paintball games and the

acquisition of weapons, with the knowledge that some co-conspirators had already traveled to Kashmir and fired on Indian positions, and with the expectation that other co-conspirators would do the same, using the training that Chapman and [Hammad] provided." J.A. 3212-13.

Chapman argues that, even assuming that paintball was a form of jihad training, the evidence does not reveal any specific intent to join LET attacks in India. We cannot agree. The record contains evidence that Chapman continued to provide support to two members of the group who expressly acknowledged going to Pakistan and firing on Indian troops while there. Sufficient evidence, therefore, supports the district court's factual findings and, accordingly, the conspiracy conviction.

2.

[10] Chapman next challenges his conviction under Count Five for conspiracy to provide material support to LET, a terrorist organization, in violation of 18 U.S.C. § 2339A. The thrust of Chapman's challenge in this regard is that much of the evidence the government relies upon to support his conviction on this count predates the statute criminalizing such conduct. Conspiracy to provide material support to terrorists was not made a crime until October 26, 2001; until that date, § 2339A was a substantive crime only.

Chapman's argument, however, overlooks the fact that, like Khan, he assisted Singh in purchasing parts for a UAV with video surveillance equipment designed primarily for military and scientific use. He provided this assistance after October 26, 2001. Export of this equipment was controlled by law; its uses as a "Military Unmanned Aerial Vehicle" include reconnaissance, weapons targeting, and similar military purposes. Even assuming that Chapman's ongoing training activities with the paintball group did not qualify as a conspiracy for purposes of § 2339A, the district court specifically found that providing paramilitary equipment to a known LET official certainly did, and we agree.

3.

[11][12] Chapman challenges his conviction under Count Twenty for possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). In order to prove guilt under this statute, the government needs "to present evidence indicating that the possession of a firearm furthered, advanced, or

helped forward" a crime of violence. *United States v. Lomax*, 293 F.3d 701, 705 (4th Cir.2002). The district court found that Chapman's transfer of a Saiga .308 rifle to Hamdi in December 2000, knowing that Hamdi had traveled to LET camps and fired on Indian troops and was engaging in the paintball training to prepare for jihad, "furthered the conspiracy to violate the Neutrality Act." J.A. 3229. Because the transfer of the weapon furthered the conspiracy to violate the Neutrality Act, the district court concluded, Chapman's possession of the weapon furthered the conspiracy. *Id.*

Chapman disputes the factual underpinnings of the district court's conclusion, arguing that "the evidence is unequivocal that it was not until January of 2002 that Hamdi told Chapman that he had fired on Indian positions in Kashmir." Appellants' Br. at 54. To the contrary, however, Hamdi testified that he told Chapman that he had fired on Indian positions in September of 2000, prior to the transfer of the weapon. This evidence was sufficient to support the district court's conclusion that Chapman possessed a rifle in furtherance *490 of a violation of the Neutrality Act, a crime of violence.

4.

[13] The district court found that Chapman was guilty as to Count Twenty-Two because, again in violation of 18 U.S.C. § 924(c), he used firearms while he was at the LET camp in furtherance of, among other crimes of violence, a conspiracy to violate the Neutrality Act and a conspiracy to provide material support to LET. Chapman challenges this finding, arguing that all he did was fire five bullets at a paper target at the LET camp and that the act did nothing to further any crimes of violence. There is no merit to this argument. Even if we were to credit, and we do not, his theory that firing "only" five bullets as training for the conspiracy to violate the Neutrality Act does not constitute use of a firearm for purposes of § 924(c), it ignores the testimony of Hamdi and others about the training in and extensive use of firearms at the LET camps. This evidence amply supports a finding that Chapman used firearms at the LET camp in furtherance of the conspiracy to commit a crime of violence.

C. Hammad's Conviction

[14] Hammad was convicted under Count Five of conspiring to contribute material support to LET in violation of 18 U.S.C. §

2339A because he knowingly trained individuals through the paintball exercises in military techniques for use with LET. Hammad argues that he did not do so knowingly. Instead, he argues, he trained members of the group for recreation and physical fitness and did not train members of the group for LET after he learned that LET was engaged in armed conflict with India.[FN7] This assertion, however, is belied by the record. Ample evidence demonstrates that Hammad continued to train people in his paintball group after he learned that some members of the group were going to work with LET in the fight against India. In light of the overwhelming evidence to the contrary, the district court expressly declined to "credit [Hammad's] testimony that paintball was strictly for recreation and physical fitness." J.A. 3207. We conclude that sufficient evidence supports Hammad's conviction for knowingly providing material support to LET in the form of trained personnel.

FN7. Hammad also challenges his conviction under Count One for the same reasons as Chapman. We deny his challenge for the same reasons we deny Chapman's. *See, supra,* Section II. B. 2. Finally, Hammad challenges his conviction under Count Eleven, conspiracy to use firearms in relation to a crime of violence in violation of 18 U.S.C. § 924(*o*). Because evidence demonstrates that Hammad engaged in the sale and transfer of AK-47s among the conspirators, we find that sufficient evidence supports his conviction on this count.

In short, we conclude that sufficient evidence supported all convictions for all defendants.

III.

A. Denial of Motion to Sever

[15] Defendants Chapman and Hammad argue that the district court erred in denying their motions to sever their trials from Khan's. They contend that the evidence admitted against Khan concerning the conspiracies to aid Al-Qaeda and the Taliban, which would not have been admitted against Chapman and Hammad in a separate trial, was so prejudicial as to deny them their right to a fair trial. We disagree.

[16][17] "The grant or denial of a motion for severance ... is within the trial court's discretion and will not be overturned absent a clear abuse of that discretion." *United States v. West,* 877 F.2d

281, 287-88 (4th Cir.1989). "Generally, individuals indicted together should be tried *491 together," *United States v. Strickland,* 245 F.3d 368, 384 (4th Cir.2001) (internal quotation omitted), and "[a] defendant is not entitled to severance merely because separate trials would more likely result in acquittal, or because the evidence against one defendant is not as strong as that against the other." *Id.* (internal quotation omitted). A defendant must instead "show prejudice in order for the court's ruling to constitute an abuse of discretion.... Convictions should be sustained if it may be inferred from the verdicts that the [fact finder] meticulously sifted the evidence." *United States v. Porter,* 821 F.2d 968, 972 (4th Cir.1987).

In this case, Chapman and Hammad fail to demonstrate prejudice resulting from the district court's ruling. The record instead shows that the judge, as factfinder, "meticulously sifted the evidence" against all of the defendants and did not demonstrate prejudice toward the other defendants based on the evidence admitted against Khan. Chapman was charged with seven counts and found not guilty of two of them. Hammad was charged with seven counts and found not guilty of four of them. Defendant Caliph was acquitted entirely. These particularized findings, along with the fact that defendants can point to no instances in the record in which the district judge displays prejudice toward defendants, indicate that the defendants each received a fair trial based on the evidence properly admitted against them and not on the evidence admitted against their co-defendants. We therefore hold that the district court did not abuse its discretion in refusing to sever Chapman and Hammad's trials from Khan's.

B. Waiver of Jury Trial Rights

[18] Their severance motion having been denied, Chapman and Hammad moved in the alternative for a waiver of jury trial pursuant to Federal Rule of Criminal Procedure 23.[FN8] Khan joined this motion, the government agreed to the requested waiver, and the district court ultimately granted it. The court did not, however, obtain a signed jury trial waiver from the defendants as opposed to their counsel. The court also did not conduct any colloquy with defendants on the record concerning the waiver.

FN8. The motion, which Chapman filed and Hammad joined, provided that

[a]lternatively, [defendants] request [ ] that, if this court

> denies [their] renewed severance motion, then the court permit [them] to waive trial by jury. Under Rule 23(a), Fed.R.Crim.P., both the accused and the government must consent to the jury waiver. A bench trial would likely result in a much shorter trial and, most certainly, would afford the accused with the opportunity to receive a fair trial.
>
> J.A. 220-21.

[19] The three defendants now argue that the jury trial waiver was invalid because the district court did not obtain their written waiver or otherwise conduct a colloquy on the record to determine that their waiver was knowing, voluntary, and intelligent. *See, e.g., Adams v. United States,* 317 U.S. 269, 277-78, 63 S.Ct. 236, 87 L.Ed. 268 (1942) (noting that a defendant's waiver of a jury trial right must be competent and intelligent). We review this claim de novo. *United States v. Robertson,* 45 F.3d 1423, 1430 (10th Cir.1995).

Federal Rule of Criminal Procedure 23(a) states

If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves.

Fed.R.Crim.P. 23(a). Defendants rely heavily on cases, most notably *492*United States v. Robertson,* 45 F.3d 1423 (10th Cir.1995), in which other circuits have suggested that a Rule 23(a) waiver presented by counsel is inadequate, absent some other showing to satisfy an appellate court that it was actually knowing, voluntary, and intelligent.

In this circuit however, we have not imposed such a requirement. In *United States v. Hunt,* 413 F.2d 983 (4th Cir.1969), we held that, while it would be "better practice" for a district judge to interrogate a defendant who claims through counsel that he wants to waive his jury trial right, nothing in the applicable case law, Rule 23(a) itself, or the Constitution requires it. *Id.* at 984; *see also United States v. Alvarez,* 1998 U.S.App. LEXIS 8788 at *6 (4th Cir.) (unpublished) ("We have held that an in-court colloquy to determine voluntariness of the waiver is good practice, but it is not required by the Constitution or Rule 23(a).").

In this case, we find that the record supports a conclusion that the waivers were voluntary, knowing, and intelligent, even though signed by counsel and in the absence of a colloquy. The motions for waiver here were made in the alternative to the motions for severance as a calculated part of the defendants' trial strategy to prevent "inflammatory and prejudicial evidence" from biasing a jury. J.A. 220.

Defendants Chapman and Hammad now claim that their waiver was not knowing or voluntary as a back door attack on the district court's denial of their motions to sever. In other words, these defendants argue that when the district court denied their motion to sever, the prospect of having a jury hear potentially inflammatory evidence against Khan forced them to relinquish their right to a jury trial. This argument is unpersuasive. Criminal defendants must frequently choose from among less than desirable alternatives. The fact that defendants would have preferred severed jury trials does not make their choice of a non-severed bench trial over a non-severed jury trial unknowing or involuntary.

In short, the record reflects that the defendants' Rule 23 waivers were a knowing, voluntary, and intelligent part of their trial strategy, and we uphold them as valid.

C. The Validity of Counts Five and Eleven

[20] All three defendants contend that Counts Five and Eleven are invalid because they constitute "conspiracies to conspire." Specifically, Count Five alleged a conspiracy to provide material support in carrying out a violation of 18 U.S.C. § 956, which criminalizes conspiracy to kill or injure persons or damage property in a foreign country. Count Eleven alleged a conspiracy to use firearms in connection with a conspiracy to commit a crime of violence. Because one cannot "conspire to conspire," defendants argue, these Counts should be dismissed. We disagree.

The facial validity of the statutes under which the defendants were charged presents a question of law which we review de novo. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123 (4th Cir.1995).

Under Count Five, defendants were convicted of "conspir[ing] to," 18 U.S.C. § 2339A(a), "provide[ ] material support ... intending that [it] be used ... in carrying out ... a violation of ... [18 U.S.C. § 956]." J.A. 3220. Section 956, in turn, criminalizes

"[c]onspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country." 18 U.S.C. § 956. Under Count Eleven, defendants were convicted of conspiring to use, carry, or possess a firearm in furtherance of, inter alia, a conspiracy to violate the Neutrality Act and a conspiracy to provide services to the Taliban. 18 U.S.C. §§ 924(c),(*o*); J.A. 3223. Both Count Five *493 and Count Eleven, in other words, expressly allow one conspiracy to serve as the predicate for another conspiracy. Nothing about this statutory framework is unconstitutional, improper, or even unusual.

Courts have recognized that one conspiracy can serve as the predicate for another conspiracy when the "[overarching] conspiracy and the predicate conspiracy are distinct offenses with entirely different objectives." *United States v. Pungitore,* 910 F.2d 1084, 1135 (3rd Cir.1990); *see also United States v. Ruggiero,* 726 F.2d 913, 918 (2nd Cir.1984) (holding that conspiracies can serve as predicate acts for a RICO conspiracy); *United States v. Brooklier,* 685 F.2d 1208, 1216 (9th Cir.1982) (same). In Count Five, the conspiracy to provide material support to terrorism represents a distinct offense with different objectives from the predicate conspiracy to kill a person. In Count Eleven, the conspiracy to use or possess a firearm represents a distinct offense with different objectives from the predicate conspiracy to violate the Neutrality Act or provide services to the Taliban. Therefore, the underlying conspiracies may properly serve as predicates for the overarching conspiracies alleged.

More fundamentally, the statutes in question expressly contemplate allowing one conspiracy to serve as the predicate offense for another conspiracy. Defendants point to no constitutional or other reason why these statutes should be struck down as invalid, and we find none.

D. Multiple Firearm Sentences for Multiple Predicate Offenses

[21] Khan and Chapman next argue that it was error for the district court to sentence them separately for each separate 18 U.S.C. § 924(c) firearms offense because those offenses all related to the same criminal episode. Under our precedent, this argument fails.

[22] This court has previously held, based on the plain language of the statute, that convictions for separate crimes of violence can lead to multiple sentences under § 924(c). *United*

*States v. Luskin*, 926 F.2d 372, 376-77 (4th Cir.1991). "There is no ambiguity in section 924(c). It states that whenever a person commits a crime of violence or drug trafficking crime and uses or carries a gun, the person shall be sentenced to a prison term that runs consecutive to the person's sentence for the underlying crime of violence or drug trafficking crime and consecutive to all other sentences." *Id.* at 376. As long as the imposition of multiple § 924(c) sentences does not violate the Double Jeopardy Clause, we will uphold those sentences in accordance with the plain language of the statute.[FN9] *Id.*

> FN9. The dissent argues that "[i]n applying *Camps* and *Luskin*, we must determine how many 'uses' are represented by the acts a defendant performed with firearms." Dissenting Op. at 35. This position may derive from the *Camps* language that "multiple, consecutive sentences under section 924(c)(1) are appropriate whenever there have been multiple, separate acts of firearm use or carriage, even when all of those acts relate to a single predicate offense." *United States v. Camps*, 32 F.3d 102, 106 (4th Cir.1994). Extrapolating from *Camps*, the dissent asserts that "[f]rom the evidence, it is impossible to determine if Khan's firings had separate objectives, different effects on the conspiracy, or occurred at times not sufficiently proximate to justify multiple sentences. Evidence does not exist in the record to conclude the firings constitute separate and distinct 'uses' for sentencing purposes." Dissenting Op. at 36-37.

Here, however, Khan was convicted of *four* predicate crimes of violence, not a "single predicate offense," and we therefore need not count "uses." *See Camps*, 32 F.3d at 106. Though Khan's four crime-of-violence convictions may have arisen from his activities during a single month in October 2001, this court has expressly and consistently rejected the notion that the convictions should therefore be considered a single "episode" for purposes of underpinning a § 924(c) violation. *See United States v. Luskin*, 926 F.2d 372, 376 (4th Cir.1991) (insisting that "there is no 'episode' test under section 924(c)," referring to the requirement in some circuits that the prerequisite convictions supporting a §

*924(e)* violation be "distinct in time, rather than literal convictions" (quoting *United States v. Towne,* 870 F.2d 880, 889 (2d Cir.1989))).

Instead, in this circuit the four crime-of-violence convictions are considered separate predicate offenses provided that they do not violate the Double Jeopardy Clause. As we discuss below, the defendants *concede* that those underlying crimes of violence constitute separate offenses and do not implicate double jeopardy concerns for purposes of *Blockburger.* "As long as the underlying crimes are not identical under the *Blockburger* analysis, then consecutive 924(c) sentences are permissible." *Luskin,* 926 F.2d at 377.

Because Khan's four crime-of-violence convictions constitute separate predicate offenses, each may support a consecutive § 924(c) sentence without requiring the court first to enumerate "uses" of firearms.

[23] In order to determine whether consecutive § 924(c) sentences violate the *494 Double Jeopardy Clause, "[t]he court must concern itself with whether the underlying crimes of violence supporting the § 924(c) charges are duplicative under a double jeopardy analysis. As long as the underlying crimes are not identical under the *Blockburger* analysis, [FN10] then consecutive § 924(c) sentences are permissible." *Id.*

FN10. Under the *Blockburger* analysis, multiple statutory provisions describe identical offenses unless "each provision requires proof of a fact which the other does not." *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Defendants concede that each of the underlying crimes of violence in this case supporting the § 924(c) charges "may be a separate offense for purposes of a *Blockburger* analysis," and, accordingly, that they do not run afoul of the Double Jeopardy Clause. Appellants' Reply Br. at 46. They, however, attempt to distinguish *Luskin,* arguing that both the indictment and the district court opinion listed all of the predicate counts on the same general factual allegation. That distinction, however, emphasizes an irrelevancy. The plain language of the statute does not speak of "general factual allegations" or a "course of conduct." Instead, it states that a defendant shall be given additional sentences for each "second or subsequent conviction." 18 U.S.C. § 924(c)(1)(C); *see*

*also Deal v. United States,* 508 U.S. 129, 135, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (noting that there is "utterly no ambiguity" in the meaning of the word "conviction" as used in § 924(c)). In other words, there is no housekeeping requirement under the statute or *Luskin* obliging either the government or the district court to present the facts in such a manner as to align the use of a particular firearm with a particular predicate offense. The fact that the district court chose to present the facts of this case as one list of factual allegations does not mean that the crimes that derived from those factual allegations were all identical as a matter of law.[FN11]

FN11. Defendants point to *United States v. Cappas,* 29 F.3d 1187 (7th Cir.1994) for the proposition that conflated factual descriptions mandate reversal because they allow for multiple § 924(c) sentences for the same offense. *Cappas,* however, relied on the fact that the conflated facts made it impossible for the appellate court to ascertain whether the jury properly followed the law and actually found that a firearm was used during each necessary predicate offense. *Id.* at 1195. In this case, with a bench trial, we do not have to worry that the fact finder did not understand the law simply because she did not spell it out in detail.

E. Section 924(c) Sentence as Unconstitutional

[24] Citing *United States v. Angelos,* 345 F.Supp.2d 1227 (D.Utah, 2004), defendants*495 argue that the lengthy sentences imposed by the "count-stacking" provisions of § 924(c) are so long as to constitute a violation of due process, equal protection, and the Eighth Amendment prohibition against Cruel and Unusual punishment. In *Angelos,* the district court opined that § 924(c) can mandate sentences that are outside of "the realm of reason." *Id.* at 1261. Notwithstanding his personal opinion, however, the district judge concluded that the relevant precedent compelled him to impose the sentence mandated by the statute. *Id.* We agree with the *Angelos* court that we are bound by precedent to uphold the constitutionality of the § 924(c) sentences imposed in this case.

Defendants' Eighth Amendment argument is simply unavailing. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin v.*

*Michigan*, 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). "The Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment." *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir.2004). Even a mandatory *life* sentence passes constitutional muster. *United States v. Kratsas*, 45 F.3d 63, 69 (4th Cir.1995). Accordingly, we hold that the mandatory sentences imposed on defendants in this case, while lengthy, do not constitute cruel and unusual punishment pursuant to the Eighth Amendment.

[25][26] Defendants' arguments under the Equal Protection and Due Process Clauses are equally unavailing. Defendants acknowledge that § 924(c) violates the Equal Protection and Due Process clauses only if they can demonstrate that the statute lacks a rational basis. Appellants' Br. at 77. The statute easily meets this standard. Discouraging and preventing the use of firearms in the commission of crimes of violence constitutes a legitimate state purpose. *See United States v. Angelos*, 433 F.3d 738, 754 (10th Cir.2006). In addition, mandatory sentencing rationally relates to this legitimate purpose by incapacitating those who have demonstrated a willingness to engage in this behavior and deterring those who may contemplate engaging in this behavior. *Id.* Therefore, we hold that the mandatory § 924(c) sentences imposed in this case violate neither equal protection nor due process.[FN12]

FN12. Defendants also argue that the mandatory sentences in this case violate separation of powers principles by placing sentencing decisions in the hands of the legislature and not the judiciary. This argument has been roundly rejected. *See, e.g., Chapman v. United States*, 500 U.S. 453, 467, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991)("Congress has the power to define criminal punishments without giving the courts any sentencing discretion."); *Rummel v. Estelle*, 445 U.S. 263, 274, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) ("[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, ... the length of the sentence actually imposed is purely a matter of legislative prerogative.").

F. The Use of Caliph's Statements at Trial

[27] The defendants argue that it was a violation of the Sixth Amendment's Confrontation Clause for the district court to admit the statements of their co-defendant, Caliph, against them without allowing them the opportunity to cross-examine him. They contend that the district court improperly considered Caliph's statements to FBI agents that the paintball activities were intended to be training for jihad overseas, and that the trainees obtained AK-47-style weapons because that was the type of weapon used in combat overseas*496 without allowing them the opportunity to cross-examine Caliph on that point. Specifically, they argue that the district court improperly used Caliph's statements against them, even though they were supposed to be admitted only against Caliph. For the following reasons, we hold that, to the extent that the admission of these statements was in error, the error was harmless.

The Supreme Court has recently held that, under the Sixth Amendment, "testimonial" out-of-court statements, such as those made during police interrogation, are inadmissible against a defendant unless that defendant has had the opportunity to cross-examine the declarant. *Crawford v. Washington,* 541 U.S. 36, 68-69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Defendants argue that Caliph's statements were testimonial because they were the result of police interrogation, and that they were admitted without the defendants having the opportunity for previous cross-examination. The government responds that defendants waived their right to cross-examine Caliph over these statements because they did not affirmatively ask the court to retain Caliph for cross-examination before he was acquitted.

[28] We do not reach the question of whether Caliph's statements were admitted in violation of the Sixth Amendment because, to the extent that any error occurred, it was harmless. *See Lilly v. Virginia,* 527 U.S. 116, 139-40, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (noting that Confrontation Clause errors are subject to harmless error analysis). Under harmless error analysis, if the government can demonstrate that the alleged error did not affect the defendants' substantial rights, we will not overturn the conviction on the basis of that error. *United States v. Rodriguez,* 433 F.3d 411, 416 (4th Cir.2006).

The district court expressly found that Caliph's statement was "cumulative of other testimony," including "at least three or four other witnesses who essentially said the same thing." J.A. 3268. The court also expressly noted that Caliph's testimony was not the main piece of evidence on which it relied for its characterization of the paintball group and that "[t]here was tons of other evidence besides the statement of Caliph." J.A. 3269. The court concluded that the admission of Caliph's statement was harmless in light of the "other evidence on the same issue." *Id.* Our independent review of the record confirms that Caliph's statements were duplicative of a wealth of other evidence and that the defendants' convictions and sentences would not have differed had Caliph's statements not been admitted. *See, e.g.*, J.A. 3178-80 (statement of Yusuf Wells, an outside observer of the paintball activity expressly found credible and reliable by the district court, indicating that paintball was a means of training); *Id.* at 3180 (statements of other witnesses saying same). We therefore reject defendants' argument that the admission of Caliph's statements constitutes reversible error.

G. The Use of Chapman's Statements against Him for the Purposes of Impeachment.

[29] Chapman testified at trial that he attended the LET camps and did not hide his attendance because his motives were innocent. The government impeached this testimony by introducing un *Mirandized* statements that Chapman made to FBI agents that he did not attend the LET camps. Chapman contends that these statements, which he made to FBI agents after being held in near solitary confinement for weeks and which the district court found were obtained in violation of *Miranda*, were also involuntary. As such, Chapman argues, they were not useable against him for any purpose. This argument fails.

*497 [30][31] The parties agree that statements obtained in violation of *Miranda* can be used to impeach a witness, but statements that were made involuntarily cannot be used against a defendant at all. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 398, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (noting that involuntary statements are statements made that were not the product of rational or free will). The issue before us is whether the statements in question were involuntary. Though we "must make an independent determination on the issue of voluntariness, the

district court's findings of fact on the circumstances surrounding the confession are to be accepted unless clearly erroneous." *United States v. Cristobal,* 293 F.3d 134, 140 (4th Cir.2002).

In this case, the district court found that:

> although Chapman's statements were procured in violation of his constitutional rights under *Miranda,* they were not involuntary under *Mincey.* . There was no evidence that government agents coerced Chapman's statements through physical pressure or imminent threats of physical harm. Moreover, the statements were false exculpatory statements rather than admissions, which suggests that Chapman's decision to make the statements was a calculated one, and thereby that his rational intellect and free will had not been overborne. For these reasons, the statements were not excluded for purposes of impeachment.

J.A. 3383.

Our review of the record in this case indicates that the district court did not clearly err in making its factual findings concerning the confession, so we accept them as true. *See* J.A. 244-80 (indicating that Chapman received medical attention from the FBI before the interrogation and providing no indication of physical force or threats of physical force against him).

[32] For the statements to be off limits to cross-examination as "involuntary," the facts would have to show that they were not "the product of a rational intellect and a free will." *Mincey,* 437 U.S. at 398, 98 S.Ct. 2408 (internal quotation omitted) (regarding the interrogation of a seriously wounded defendant suffering unbearable pain, almost in a coma, lying on his back in an intensive care unit encumbered by tubes, needles, and breathing apparatus). "To determine whether a defendant's will has been overborne or his capacity for self determination critically impaired, [we] must consider the 'totality of the circumstances,' including the characteristics of the defendant, the setting of the interview, and the details of the interrogation." *Cristobal,* 293 F.3d at 140. In this case, the totality of the circumstances indicates that Chapman's statements were voluntary. Chapman freely answered some questions and declined to answer others. He joked with the agents, told them that he did not need his rights read to him, and seemed anxious to talk with them. On this

record, the district court's refusal to find Chapman's statements to be involuntary was correct. Accordingly, use of those statements on cross-examination was appropriate.[FN13]

FN13. Even if it was error to allow Chapman to be cross-examined on the basis of the false exculpatory statements at issue, the error was harmless. The statements were relevant only to undermine Chapman's credibility. Yet, the district judge specifically noted that she found many reasons to question Chapman's credibility, and that her conclusions about his lack of credibility "were not based solely or even to any significant degree on that particular false exculpatory statement." J.A. 3271.

H. Selective Prosecution

[33] Defendants finally argue that the district court erred in denying them discovery*498 on their selective prosecution claim. Specifically, they contend that the government has not investigated and prosecuted other alleged terrorist organizations, such as the Cambodian Freedom Fighters or the Irish Republican Army, as aggressively as it has investigated and prosecuted them, leading to an unconstitutional denial of their right to "equal protection under the law."

[34][35] A selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the "Executive" and, accordingly, must pass a high threshold in order to succeed. *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). The Executive's discretion is not, however, limitless. Equal protection demands that "the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (internal quotation omitted). In addition, "[a] defendant may demonstrate that the administration of a criminal law is directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive that the system of prosecution amounts to a practical denial of equal protection of the law." *Id.* at 464-65, 116 S.Ct. 1480 (internal quotation omitted).

[36] In order to obtain discovery on a selective prosecution claim, a defendant must make "a credible showing of different treatment of similarly situated persons." *Id.* at 470, 116 S.Ct. 1480. This showing "should itself be a significant barrier to the litigation of insubstantial claims." *Id.* at 464, 116 S.Ct. 1480. In

deference to executive discretion, we have held that "defendants are similarly situated when their circumstances present *no* distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir.1996) (emphasis added). Finally, "when we review a district court's discovery order in support of a selective-prosecution claim, we are determining the legal adequacy of the evidence. We review the legal adequacy of evidence de novo." *Id.* at 743.

In the present case, defendants do not make a showing that the other alleged terrorist groups about which they complain are "similarly situated" to them for purposes of selective prosecution. Defendants contend that "the only distinguishing factor between [the other alleged terrorist groups] and the appellants, is that the appellants are Muslim in a post-9/11 world." Appellant's Br. at 88. This contention, however, misses the very obvious fact that defendants were accused of supporting LET, a terrorist group that supported the Taliban and Al-Qaeda, which were in direct conflict with the United States. The Executive branch has the right to focus its prosecutorial energies on alleged terrorists groups that present the most direct threat to the United States and its interests. Accordingly, we hold that the district court did not err in denying discovery on defendants' selective prosecution claim because the available evidence demonstrates that legitimate prosecutorial factors motivated the government's prosecutorial decisions.

In short, we hold that all of the convictions in this case were supported by substantial evidence and were obtained without material error. We also hold that Khan's and Chapman's sentences were correctly imposed. Accordingly, we affirm all of the convictions for all three defendants and the sentences of Khan and Chapman.

IV.

[37] The government cross-appeals Hammad's sentence, arguing that the district judge erred in reducing Hammad's sentence below the recommended Sentencing*499 Guidelines range. This cross-appeal causes us once again to consider what makes a federal sentence "reasonable" after *United States v. Booker*, 543 U.S. 220, 264, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) ("The courts of appeals review sentencing decisions for unreasonableness."). For the reasons discussed below, we hold

that, under our precedent, Hammad's sentence represents an unreasonable downward variance from his recommended guideline range and, as a result, we remand for re-sentencing.[FN14]

FN14. We note that the district court sentenced Hammad on July, 29, 2005, without the benefit of our precedent in *United States v. Green,* 436 F.3d 449 (4th Cir.2006), or *United States v. Moreland,* 437 F.3d 424 (4th Cir.2006). Accordingly, our conclusion that Hammad's sentence does not accord with those precedents is not meant in any way as criticism of the district court.

In *United States v. Green,* 436 F.3d 449, 455-56 (4th Cir.2006), we held that to sentence a defendant, district courts must (1) properly calculate the sentence range recommended by the Sentencing Guidelines; (2) determine whether a sentence within that range and within statutory limits serves the factors set forth in [18 U.S.C.] § 3553(a) and, if not, select a sentence that does serve those factors; (3) implement mandatory statutory limitations; and (4) articulate the reasons for selecting the particular sentence, especially explaining why a sentence outside of the Sentencing Guideline range better serves the relevant sentencing purposes set forth in § 3553(a).

*Id.* We also emphasized that any variance from the Guidelines range must be based on the § 3553(a) factors and further indicated that, for sentences falling outside of the Guidelines range, a district court must provide an adequate statement of reasons for the variance and rely on permissible factors in making the variance. *Id.* at 456-57. Finally, we noted that a reasonable sentence cannot give "excessive weight" to any relevant factor and must "effect [ ] a fair and just result." *Id.* at 457.

We later enhanced this understanding of reasonableness in *United States v. Moreland,* 437 F.3d 424 (4th Cir.2006), noting that, while the district court does not need to discuss the § 3553(a) factors in checklist fashion, the court must explain the reasoning behind any sentence, particularly sentences that vary from the range recommended by the Guidelines. *Id.* at 433. In particular, we held that "[t]he farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." *Id.* at 434.

With this guidance in mind, we now turn to the sentence in this case. The parties agree that the district judge properly

calculated Hammad's Guidelines range as 97-121 months imprisonment. The 52-month sentence imposed on him therefore reflected a significant reduction.[FN15] The district court explained the reduction as follows:

FN15. Hammad's sentence was still within the statutory range.

Among the things that the Court is required to look at under section 3553(a) [are] any disparities that might arise among defendants with similar records and found guilty of similar conduct. Both Mr. Surratt and Mr. [Hammad] had military experience, as I recall. Both of them had completely clean records, and I think their overall participation in the paintball and the activities that led to their convictions was roughly equivalent. There are some differences which I have taken into consideration. For example, there was evidence during the trial *500 about conversations between this defendant and Mr. Royer about the investigation that was going on. As you recall, there [were] discussions about the destruction of computer files and that sort of thing, which suggests to me perhaps a slightly higher level of culpability but not significantly so.

I think that an appropriate sentence, taking into consideration what this defendant did, his background, and the needs for the sentence reflecting the seriousness of the offense to promote respect for law and also, however, to be just punishment, to serve as adequate deterrence to those in the public, to protect the public from further harm from the defendant, that a proper sentence is much closer to that that was imposed on Mr. Surratt.

And for those reasons, it is the sentence of the Court that as to ... the three counts of conviction ... the defendant be committed to the custody of the Bureau of Prisons for a period of 52 months.

J.A. 3448-49. Surratt had earlier been sentenced to 46 months.

We first note that the variance in this case reduced Hammad's sentence from his recommended guidelines sentence by almost half. Accordingly, under the principles outlined in *Moreland*, the district court must present compelling reasons for the variance. The judge indicated that she considered what this defendant did, his background, and the needs for the sentence reflecting the seriousness of the offense to promote respect for law and also, however, to be just punishment, to serve as adequate deterrence to

those in the public, to protect the public from further harm from the defendant....

J.A. 3448-49. However, the sentence reduction imposed focused almost exclusively on Surratt's sentence. It was not, at heart, the necessary independent review of all of the § 3553(a) factors culminating in a sentence. It was, instead, an independent review of all of the § 3553(a) factors culminating in the conclusion that Hammad's sentence should be similar to Surratt's. This process provided "excessive weight," *Green*, 436 F.3d at 457, to "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). The variance, by focusing almost exclusively on Surratt's sentence, did not give proper weight to the other § 3553(a) factors and, accordingly, led to an unreasonable sentence.

Moreover, the facts do not support the district court's conclusion that Hammad and Surratt were similarly situated. Surratt was the second of the eleven defendants to plead guilty, only one day after the first defendant to do so. Surratt accepted responsibility and cooperated by providing information that led to a superseding indictment against his co-conspirators, and then testifying as a witness at trial. The district court gave Surratt a three-level sentence reduction for that acceptance of responsibility.

In contrast, Hammad gave false statements to investigators and destroyed evidence before trial, in addition to providing "incredible" testimony at trial. As a result, the district judge enhanced Hammad's sentencing level by two for obstruction of justice. In other words, the difference between the recommended sentencing ranges for Surratt and Hammad reflect the fact that Surratt accepted responsibility and provided valuable assistance to the government, while Hammad never accepted responsibility and obstructed justice both before and during his trial.

*591 By giving Hammad a significant sentence reduction on the theory that he was "similarly situated" to Surratt, the district court impermissibly ignored the primary reason that Hammad and Surratt had different recommended Guidelines ranges in the first place: the fact that the Guidelines treat those who accept responsibility and those who obstruct justice differently. We cannot accept the district court's conclusion which, in effect, provides no benefit to Surratt for substantially assisting the

government and provides no punishment to Hammad for obstructing justice. Such a conclusion both ignores Congress' determination concerning how to treat obstruction of justice and acceptance of responsibility, and potentially discourages beneficial behavior from future defendants.

We accordingly remand with instructions to re-sentence Hammad in accordance with the principles outlined in *Green* and *Moreland.*

V.

In conclusion, we hold that all of the convictions in this case were supported by sufficient evidence and were obtained without material error. We affirm those convictions and the sentences of Khan and Chapman. We further hold that Hammad's sentence was an unreasonable variance from his recommended guideline range and remand for re-sentencing.

*AFFIRMED IN PART; REMANDED IN PART*

GOODWIN, District Judge, concurring in part and dissenting in part:

I concur in the majority opinion except as to Part III.D, which affirms sentences imposed under 18 U.S.C. § 924(c) for Seifullah Chapman and Masoud Khan. Though I agree we should affirm Chapman's § 924(c) sentences, I would merge Khan's § 924(c) convictions and remand for the imposition of one sentence of 120 months for his three gun convictions.

I.

The Superseding Indictment charges sixteen separate violations of 18 U.S.C. § 924(c). J.A. 151-52. Most of the counts charge multiple defendants and include the use of different firearms in different locations on different dates. The shotgun-style Indictment simply lists the defendants involved, the approximate dates, the firearms used, and the general location for each count in less than one page. No attempt is made to provide notice to the defendants as to which counts are tied to which underlying predicate offenses. Instead, the Indictment ties the sixteen alleged § 924(c) violations to all offenses outlined in Counts 1-10, which is troubling because not all defendants charged in the gun counts are charged in each of the first ten counts. J.A. 151.

Khan received three convictions under § 924(c). For each count Khan was convicted of, the Indictment lists "Khan, Royer, Chapman, and Abdur-Raheem" as the defendants involved. Rather than provide exact dates, as do most of the other gun counts, the Indictment alleges Counts 24-27 occurred in "October 2001." The location is not specific but rather lists the entire country of "Pakistan." The only distinction made relates to the type of firearm used-Count 24 charges the use of an AK-47 automatic rifle; Count 25 the use of a 12mm antiaircraft gun; and Count 27 the use of a rocket-propelled grenade. In a foot-note, the district court explained the limited nature of Khan's use of these weapons: "We accept the defendants' evidence that the firing of these weapons was highly limited in that very little ammunition was provided." J.A. 3195. According to the evidence, Khan fired only one bullet *502 with each weapon at some form of target. *Id.*

For these three convictions, Khan received mandatory consecutive sentences: 120 months for the first § 924(c) conviction, 300 months for the second, and life in prison for the third. Judge Brinkema explained that she was compelled to impose the sentences. *Id.* at 3308. She stated that these crimes were serious, "but there are murderers who get far less time than this, and I have sentenced Al-Qaeda members who were planning real attacks on these shores for far less time ... and I have to tell you that this is sticking in my craw." *Id.*

II.

Unlike most circuits,[FN*] we allow multiple § 924(c) convictions for conduct in the same underlying offense. *United States v. Camps*, 32 F.3d 102, 107-08 (4th Cir.1994). By allowing convictions for multiple gun uses, even if during the same underlying conspiracy, we comply with congressional intent to harshly punish the use of guns to commit felonies, and to punish subsequent uses of guns even more harshly. *See id.* at 108 (citing 114 Cong. Rec. 22231 (1968)) ("We are also satisfied that this interpretation best achieves section 924(c)(1)'s unmistakable objective of 'persuading the man who is tempted to commit a federal Felony to leave his gun at home.'"). If multiple § 924(c) convictions were not permissible for the same underlying offense, no deterrent would exist for criminals using guns throughout an extended conspiracy.

FN* *United States v. Anderson,* 59 F.3d 1323 (D.C.Cir.1995); *United States v. Cappas,* 29 F.3d 1187 (7th Cir.1994); *United States v. Lindsay,* 985 F.2d 666 (2d Cir.1993); *United States v. Sims,* 975 F.2d 1225 (6th Cir.1992); *United States v. Moore,* 958 F.2d 310 (10th Cir.1992); *United States v. Hamilton,* 953 F.2d 1344 (11th Cir.1992); *United States v. Privette,* 947 F.2d 1259 (5th Cir.1991); *United States v. Fontanilla,* 849 F.2d 1257 (9th Cir.1988). *But see United States v. Mabry,* 3 F.3d 244 (8th Cir.1993).

Our rule's justification is apparent from examining our decisions in *United States v. Camps* and *United States v. Luskin,* 926 F.2d 372 (4th Cir.1991). In *Camps,* the defendant received eight convictions under § 924(c). *Camps,* 32 F.3d at 105. For sentencing purposes, however, these convictions were grouped, which resulted in only three § 924(c) sentences. *Id.* The first sentence was imposed for the use of an AK-47 during a December 23, 1989 ambush of a rival drug boss. *Id.* at 103. The second sentence was imposed for a conviction for the use of an AK-47 and a conviction for the use of an Uzi during another ambush on January 7, 1990. *Id.* at 103-04. The third sentence was imposed for carrying five separate semi-automatic weapons that were seized from a van that the defendant was using to flee. *Id.* at 104.

Judge Luttig, writing for the court, explained that for that case only, the court accepted the government's concession that multiple firearms carried at one time can result in only one § 924(c) sentence. *Id.* at 109 n. 9. I would apply this rule to all cases where the different firearms relate to the same objective, have the same effect on the predicate crime, and are used or carried proximately in time.

In *Camps,* though each grouped "use" was tied to the underlying drug conspiracy, each "use" was directed toward a different objective of the conspiracy, occurred at distinctly different times, and had different effects on the conspiracy. Criminalizing only the December 1989 use would not account for the fact that the defendant made the criminal decision to use more guns later to further other objectives of the conspiracy. Three § 924(c) sentences *503 were justified to account for the defendant's multiple uses of firearms.

Multiple sentences under § 924(c) were also justifiable in *Luskin*, the case on which the majority relies. Luskin hired someone to kill his wife. On three distinct occasions, the hitman attempted the murder. *Luskin*, 926 F.2d at 373 (stating the first attempt was on March 9, the second attempt May 30, and the third attempt July 27). The court imposed a separate § 924(c) sentence for each attempt. *Id.* at 374. The attempts, each nearly two months apart, were sufficiently distinct to justify multiple sentences. *Id.* at 375 (explaining that before the third attempt, Luskin offered a $25,000 bonus, and stating Luskin could have called off the hired gun at any time).

With respect to Khan, however, multiple § 924(c) sentences are not justifiable.

III.

In applying *Camps* and *Luskin*, we must determine how many "uses" are represented by the acts a defendant performed with firearms. *See Camps*, 32 F.3d at 109 ("Because there were *three separate uses and/or carryings* of the weapons ....") (emphasis added). The majority's decision in this case fails to consider whether the underlying uses were sufficiently distinct to justify multiple sentences. Instead, the majority opines that "there is no housekeeping requirement under the statute or *Luskin* obliging either the government or the district court to present the facts in such a manner as to align the use of a particular firearm with a particular predicate offense." *Op.* at 494. Examining whether a defendant's conduct contains sufficiently distinct "uses" to justify multiple § 924(c) sentences is much more than a housekeeping requirement. It is necessary to ensure the defendant receives a fair sentence and is not punished separately for conduct that should be merged for sentencing purposes.

Under the majority's reasoning, no boundaries exist for § 924(c) prosecutions. That is, a drug conspirator could pick up a gun, place it on the table to scratch his nose, pick it back up, and receive two § 924(c) sentences. An itchy nose could cost him an additional fifteen years. Likewise, a defendant could carry three dangerous weapons at one time, be convicted of three § 924(c) sentences, and receive a life sentence. Applying this statute without boundaries of reason and ordinary meaning leads to absurd results.

In determining how to draw the boundaries, courts examine a number of factors but primarily focus on the objectives, the effects, and the timing of the defendant's conduct. *See United States v. Finley,* 245 F.3d 199, 206-08 (2d Cir.2001); *United States v. Wilson,* 160 F.3d 732, 749 (D.C.Cir.1998); *United States v. Lucas,* 932 F.2d 1210, 1222-23 (8th Cir.1991). Where the "uses" of a defendant have substantially the same objective, substantially similar effects on the predicate offense, and are proximate in time to one another, our justification for sustaining multiple § 924(c) sentences does not exist.

Sustaining three § 924(c) sentences for Khan's convictions creates a result Congress surely did not intend. The evidence discloses only one objective Khan had when firing the weapons, which was to enhance his training in preparation for moving into Afghanistan. As Judge Brinkema noted, the evidence on Khan's firing of the weapons was highly limited. J.A. 3195. No evidence exists to suggest that each so-called "use" of the weapons had any kind of different effect on the predicate conspiracy. There is no evidence to accurately determine the temporal proximity of the firings. The Indictment does not even attempt to distinguish *504 the timing of each use, but merely lists each of Khan's uses as occurring in October 2001. J.A. 152. From the evidence, it is impossible to determine if Khan's firings had separate objectives, different effects on the conspiracy, or occurred at times not sufficiently proximate to justify multiple sentences. Evidence does not exist in the record to conclude the firings constitute separate and distinct "uses" for sentencing purposes. Accordingly, I would merge the three § 924(c) convictions for sentencing purposes, and would remand with instructions to impose a sentence of 120 months for these convictions.

United States District Court, E.D. Virginia.
Alexandria Division.
UNITED STATES of America,
v.
Masoud KHAN, et al., Defendants.
No. CRIM.03-296-A.
March 4, 2004.

*MEMORANDUM OPINION*

BRINKEMA, District Judge.

This case came on for trial by the Court [FN1] beginning February 9, 2004 on an *796 indictment against defendants Masoud Khan, Seifullah Chapman, Hammad Abdur-Raheem, and Caliph Basha Ibn Abdur-Raheem (hereinafter Caliph Basha). The indictment charged these four defendants, co-defendants who entered guilty pleas, and unnamed, unindicted co-conspirators with 32 counts. The superseding indictment alleged against these four defendants conspiracy (Count 1, 18 U.S.C. § 371), conspiracy to levy war against the United States (Count 2, 18 U.S.C. § 2384), conspiracy to provide material support to al-Qaeda (Count 3, 18 U.S.C. § 2339B), conspiracy to contribute services to the Taliban (Count 4, 50 U.S.C. § 1705), conspiracy to contribute material support to Lashkar-e-Taiba ("LET") (Count 5, 18 U.S.C. § 2339A), commencing an expedition against a friendly nation (Counts 9-10, 18 U.S.C. § 960), conspiracy to possess and use firearms in connection with a crime of violence (Count 11, 18 U.S.C. § 924(*o*)), receipt of ammunition with cause to believe a felony will be committed therewith (Counts 12-14, 18 U.S.C. § 924(b)), and use and possession of firearms in connection with a crime of violence (Counts 20-22, 24-27, 31-32, 18 U.S.C. § 924(c)).[FN2] Co-defendants Randall Royer, Ibrahim Al-Hamdi, Yong Kwon, Mohammed Aatique, Donald Surratt, and Mahmoud Hasan entered into plea agreements and pled guilty to various counts in the indictment.

FN1. The Government and all four defendants waived the right to trial by jury.

FN2. Count 15, charging Chapman with making false official statements, was dismissed with prejudice by Order of January 16, 2004 because the motion to suppress the underlying statements was granted. Counts 6, 16, and 17

relate only to defendant Sabri Benkhala. The counts against Benkhala were severed for trial and are not discussed in this opinion.

The factual allegations in the indictment focus on the defendants' involvement in activities starting in January 2000 and continuing through June 2003, which the government maintained constituted preparation for violent jihad overseas against nations with whom the United States was at peace and providing material support to terrorist organizations. The indictment alleges that the preparations culminated in Khan and other co-conspirators attending a terrorist and jihad training camp after September 11, 2001, with the intent to proceed to Afghanistan and fight for the Taliban and Al-Qaeda against United States troops. The indictment further alleges that Royer and Al-Hamdi had participated in attacks on Indian forces in the disputed Kashmir region.

After the conclusion of the government's evidence, defendants moved for judgment of acquittal pursuant to Fed.R.Crim.P. 29. The motions of Khan, Chapman, and Hammad Abdur-Raheem were granted in part and denied in part, and various counts dismissed with prejudice as to these defendants, as detailed in our Order of February 20, 2004. The motion was granted in its entirety as to Caliph Basha, and all counts against him were dismissed with prejudice, because we found insufficient evidence to support conviction on any count, for the reasons stated in open court. At the conclusion of all the evidence, the defendants renewed their motions for judgment of acquittal as to the remaining counts. Those motions were denied.

This memorandum opinion explains the factual findings and legal conclusions that support our judgment that defendant Khan is guilty of Counts 1, 2, 4, 5, 11, 24, 25, and 27; defendant Chapman is guilty of Counts 1, 5, 11, 20, and 22, and defendant Abdur-Raheem is guilty of Counts 1, 5, and 11; and that these defendants are not guilty of the remaining counts.

*I. Procedural background-Motion to suppress*

Before trial, defendant Chapman moved to suppress, pursuant to *797*Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) and *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), the use and derivative use of statements that his former counsel, Phillip Leiser,

made during a pretrial suppression hearing. As explained in open court and discussed in more detail in this opinion, we suppressed direct use of Leiser's testimony, but allowed the use of evidence related to his statements, finding that the *Kastigar* derivative use doctrine did not apply, and that even if *Kastigar* did apply, that the government satisfied its burden to show that the evidence at issue was an inevitable discovery from an independent source.

*A. Background*

After he was initially indicted, Chapman was arrested by authorities in Saudi Arabia, and was turned over to United States law enforcement agents. Chapman was then transported from Saudi Arabia to the Eastern District of Virginia by airplane. Count 15 of a superseding indictment alleges that during this flight Chapman made false statements, in violation of 18 U.S.C. § 1001(a), that he had not attended or seen LET or jihad training camps.

Chapman moved to suppress any statements made to law enforcement after his arrest in Saudi Arabia, on the grounds that they were in violation of his Sixth Amendment right to counsel. *See Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). Specifically, Chapman argued that his statements must be suppressed because he had retained Leiser as counsel, the government was aware that Leiser had been retained, and Chapman desired his attorney's assistance in dealing with interrogation. The government responded to the motion by arguing that Chapman had told FBI agents aboard the plane that Leiser was no longer his attorney, he did not know whether an attorney had been appointed for him, and that the FBI agents relied on these statements in continuing to question Chapman.

To resolve the disputed facts regarding whether Leiser was Chapman's attorney at the time of questioning, the Court held an evidentiary hearing. Chapman's present counsel, Lisa Kemler, called Leiser as a witness to testify as to the existence and scope of the attorney-client relationship between Chapman and Leiser. Leiser's testimony detailed his communications with Chapman regarding FBI Special Agent Wade Ammerman's request for an interview with Chapman and Leiser's efforts to arrange such an interview. On cross-examination, Assistant U.S. Attorney Gordon Kromberg asked:

Q. In your communications with Mr. Chapman, did he tell

you that he needed representation regarding his attendance at a Lashkar-e-Taiba training camp in Pakistan?

A. No.

Q. About his travel to Pakistan?

A. No.

Q. About violations of the Neutrality Act for going to Pakistan?

A. No.

Q. Material to support terrorism?

A. No.

Q. For firearms charges?

A. No.

THE COURT: Mr. Kromberg, why are these questions relevant?

MR. KROMBERG: I think they're relevant, Your Honor, because if the suggestion is that Mr. Chapman had retained this attorney for the purposes of this case, I would think that Mr. Chapman would have said what some of the problems that he-some of the liability he was facing. He may not have known the particular statutes involved, but maybe he did, because *798 at this point in time, Mr. Royer was talking to his lawyers about these very issues.

On redirect, Kemler asked:Q. Mr. Leiser, what was Mr. Chapman's understanding of what they wanted to talk to him about?

A. Mr. Chapman had indicated that he had regularly attended the Islamic Institute, I believe, here in Northern Virginia, that he had met somebody there who had asked him to make a purchase of some video equipment which he understood was later used on some type of remote-controlled, like, model airplane, and that his understanding was that Agent Ammerman wanted to discuss that, that purchase with him.

While Leiser was reviewing his notes, the Court noted: Ms. Kemler, I didn't probe this with you, but obviously, by asking these questions on behalf of Mr. Chapman, there's been a waiver to some degree of the attorney-client privilege.

MS. KEMLER: Yes. We were aware of that, Your Honor.

> Kemler then followed up: Q. Okay. After looking at your notes, do you recall any additional matters that were discussed about what the scope of the interview would be?
>
> A. No, that was it. Mr. Chapman had informed me about the prior questioning in '99 or 2000, that it concerned this paintball exercises that he engaged in with some friends, but that he believed that this particular questioning concerned a purchase of the video equipment for a person named Khalid, Khalid Singh.

Chapman then sought to suppress at trial the direct use of Leiser's testimony regarding the purchase of video equipment under the holding in *Simmons,* and argued that records documenting the purchase of video equipment and communications regarding the purchase must also be suppressed as fruits of the suppression hearing testimony pursuant to *Kastigar.*

*B. Discussion*

[1] Chapman relies on *Simmons,* which held that a defendant may testify in a pretrial suppression hearing without surrendering his Fifth Amendment right not to be forced to incriminate himself. In *Simmons,* the defendant testified at a suppression hearing to establish he had standing to bring a Fourth Amendment challenge to a search. The state then sought to admit the defendant's suppression hearing testimony at trial to link him to the evidence. The Supreme Court ruled that the defendant's testimony at the suppression hearing did not waive his Fifth Amendment right not to have his testimony used against him at trial, reasoning that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394, 88 S.Ct. 967. Here, Chapman faced a similar predicament, as he was required to waive his attorney-client privilege, derived from the Fifth and Sixth Amendments, in order to assert his rights under the Fifth and Sixth Amendments to suppress statements made without benefit of counsel.

The government argues that Leiser's testimony about the subject matter of his discussions with Chapman was a voluntary disclosure inconsistent with the confidential attorney-client relationship which waives the privilege. *See In re Grand Jury Subpoena,* 204 F.3d 516, 521 (4th Cir.2000); *United States v. Jones,* 696 F.2d 1069, 1072 (4th Cir.1982). The government also

argues that *Simmons* is inapplicable here, because the attorney-client privilege is a common law privilege and not a constitutional right. The government*799 found authority for its arguments in the Eleventh Circuit's decision in *In re Federal Grand Jury Proceedings (Cohen),* 975 F.2d 1488 (11th Cir.1992), which held that an attorney's testimony at a suppression hearing waived the attorney-client privilege, rejecting the *Simmons* analogy.

[2] We agree with Chapman that *Simmons* is an appropriate analogy, and therefore applies to the facts of this case. Although the attorney-client privilege is a common law right, when, as here, it is invoked by a criminal defendant to protect the confidentiality of his communication with his attorney regarding a law enforcement investigation, the privilege must be considered an extension of the Fifth Amendment right against self-incrimination and the Sixth Amendment right to effective assistance of counsel. *See Swidler & Berlin v. United States,* 524 U.S. 399, 407, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998); *Bittaker v. Woodford,* 331 F.3d 715, 723 n. 9 (9th Cir.2003) (citing cases). On the facts of this case, Chapman faced a Hobson's choice similar to that of the defendant in *Simmons,* in which Chapman was required to waive the privilege in order to effectively assert his Fifth and Sixth Amendment rights. Because the government, in its opposition to the motion to suppress and on cross-examination, suggested that Leiser was not representing Chapman in relation to the criminal charges about which Chapman was questioned on the flight, defendant's counsel had to elicit testimony about the subject matter of the representation to assert fully Chapman's right to counsel.

We are not persuaded by the Eleventh Circuit's conclusion in *In re Federal Grand Jury Proceedings (Cohen)* that *Simmons* does not apply to a waiver of the attorney-client privilege in a suppression hearing. To reach its conclusion, the Eleventh Circuit questioned the continuing vitality of *Simmons,* and found that *Simmons* had never been extended to situations involving the exclusion of prior testimony when competing rights, whether constitutional or statutory, are at issue. The Supreme Court has repeatedly reaffirmed *Simmons, see, e.g., United States v. Salvucci,* 448 U.S. 83, 89, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), and *Simmons* remains good law in the Fourth Circuit, *see, e.g., Oken v. Corcoran,* 220 F.3d 259, 267 (4th Cir.2000). Further, the

reasoning of *Simmons* has been extended to bar the government's use at trial of a defendant's prior statements when competing rights are at issue. *See United States v. Branker,* 418 F.2d 378 (2d Cir.1969) (defendant's testimony supporting his application for appointed counsel not admissible at trial). Finally, the Eleventh Circuit's decision is in tension with the Fifth Circuit's decision in *In re United States of America,* 878 F.2d 153 (5th Cir.1989). In that case, defendants sought to take a Rule 15 deposition of an attorney to establish the existence of an attorney-client relationship, to show that conversations between the defendants and that attorney were privileged, and therefore could not be used by the government. The defendants sought to take the deposition *ex parte* because they were concerned that the participation of government counsel in the deposition would constitute a waiver of the privilege. The Court dismissed this concern, rejecting the contention that calling the attorney to testify at a hearing on a motion to dismiss or suppress would waive the privilege:

"We are aware of no authority that would support such a waiver, and neither the district court nor the [defendants] (here or below) have cited any authority which assertedly supports it.... [I]t would appear that use of the attorney's testimony by the [defendants] at the hearing on their motion to dismiss the indictment or to suppress, to establish*800 that the indictment, or the evidence to be suppressed, resulted from a government-induced breach of the attorney-client privilege would not result in a waiver thereof. Seeking to thus enforce the privilege hardly seems to constitute a waiver of it."

878 F.2d at 158. We find that the facts described in this case are closely analogous to the issue before us.

We also find an appropriate analogy to the instant case in the Ninth Circuit's recent decision in *Bittaker,* 331 F.3d at 723. In *Bittaker,* the Ninth Circuit, sitting *en banc,* applied *Simmons* to hold that a habeas petitioner's waiver of the attorney-client privilege to bring claims of ineffective assistance of counsel was a limited waiver for purposes of the habeas proceedings only, and did not waive the privilege for any subsequent retrial. In reaching this conclusion, the court assumed that the attorney-client privilege had a constitutional dimension in the criminal context, and found that the waiver of the privilege in the habeas proceeding was "voluntary ... only because there is no other means of

protecting legal rights.... The scope of required disclosure should not be so broad as to effectively eliminate any incentive to vindicate [one's] constitutional right[s]." 331 F.3d at 723 (internal citations and quotations omitted). The Ninth Circuit upheld the protective order entered by the district court that limited the use of privileged material disclosed in the habeas proceeding in any future retrial. *Id.* at 728.

[3] Accordingly, we prohibited the government from introducing Leiser's testimony at trial. After Leiser testified at the suppression hearing, the government discovered documentary evidence that Chapman had helped Pal Singh in Coventry, England purchase equipment from www.wirelessvideocameras.com. Chapman moved that this evidence be suppressed as fruits of Leiser's testimony, arguing that *Simmons* prohibits both use and derivative use of suppression hearing testimony.[FN3] *See United States v. Boruff*, 870 F.2d 316, 318-19 (5th Cir.1989). As to the derivative use of Leiser's testimony, Chapman argued that *Kastigar* requires the government to show that the discovery of evidence about wireless video equipment and Khalid Singh after Leiser's testimony was not tainted by that privileged testimony.

> FN3. Chapman also urged that the evidence be suppressed as a sanction against the government for failure to timely disclose that the FBI had intercepted e-mail communications between Chapman and Leiser demonstrating their attorney-client relationship, because timely disclosure would have made Leiser's suppression hearing testimony unnecessary. We rejected this argument because we found that the government's disclosure of the information complied with the discovery orders in this case, and that there is no evidence of bad faith or deliberate concealment.

The government responded that *Kastigar* applies only to compelled testimony and does not apply to evidence derived from privileged communications. *See United States v. Squillacote*, 221 F.3d 542 (2000); *Nickel v. Hannigan*, 97 F.3d 403, 409 (10th Cir.1996). The government further argued that even if *Kastigar* did apply, the bank records that documented the purchase had been subpoenaed and received by agents before Leiser testified. The agent charged with reviewing the records had not been

through them, but had been tasked to do so before trial. Lastly, the purchase of the electronic equipment was sufficiently clear from the bank records that it would have triggered further investigation.

We agree with the government that *Kastigar* does not apply to the facts of this case. In *Squillacote,* the Fourth Circuit held that *Kastigar* 's protections against derivative use are triggered by the government's*801 efforts to compel testimony over assertions of constitutional privilege, not the mere existence of evidence that may be protected by a privilege. 221 F.3d at 559. Although the facts of *Squillacote* involved the non-constitutional psychotherapist-patient privilege, the Fourth Circuit relied on the reasoning of the Tenth Circuit in *Nickel,* which concerned the attorney-client privilege of a criminal defendant. *Nickel* held that even if the testimony of a defendant's attorney should have been suppressed on the basis of the attorney-client privilege, the "fruit of the poisonous tree" doctrine does not apply to suppress evidence derived from the attorney's testimony. 97 F.3d at 409. Based on these authorities, we found that a *Kastigar* hearing was not necessary in this case.

[4] Nonetheless, in an abundance of caution, we required the government to submit information detailing how it came to discover the details surrounding Chapman's purchase of wireless video equipment. The government responded that FBI agents reviewed Chapman's banking records, which had been subpoenaed previously, in preparation for trial. On or about January 9, 2004, agents identified a $986 purchase from www.wirelessvideocameras.com, and contacted that vendor to obtain additional evidence regarding the purchase. The vendor's records led the agents to Pal Singh.

*Kastigar* imposes on the government "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony," 406 U.S. at 460, 92 S.Ct. 1653. Moreover, the government may not use compelled testimony to provide a lead that alters the course of the investigation. *See United States v. Harris,* 973 F.2d 333 (4th Cir.1992).

The facts in this record led us to find that the discovery of the wireless video purchase was wholly independent from Leiser's testimony. First, although the purchase was not identified in the bank records until January 9, 2004, after Leiser's testimony in

December 2003, the records themselves were subpoenaed and in the possession of the government before Leiser's testimony. Second, the review of financial records in preparation for trial is a routine investigative tool, and we did not find that such a routine task would have been ignored but for Leiser's testimony. Finally, any agent would have immediately recognized the significance of the wireless video purchase, even without the lead provided by Leiser. The $986 purchase was by far the largest purchase in Chapman's records for the relevant month. Well before Leiser testified, the government had flagged as significant the fact that LET had used model airplanes, and agents already knew that Khan had purchased model airplane equipment with wireless video capacity. Indeed, Khan's purchase of model airplane equipment was alleged in the indictment as overt act # 83 in furtherance of several conspiracy counts. For these reasons, we found that even if the derivative use of Leiser's statements were prohibited by *Simmons* and *Kastigar*, the government established that the discovery of Chapman's wireless video purchase was independent, and not derived from that testimony.

*II. Findings of Fact*

The majority of the facts in this case are not in dispute. Rather, the parties differ dramatically as to the interpretation to be placed on the facts. More specifically, the government contends that the three defendants on trial shared extremist views of Islam with the others indicted in this case, which led them to prepare for violent physical jihad themselves or to prepare others for violent jihad directed at nations with whom the United States is at peace, and ultimately, at the United States.

*802 Defendant Chapman counters that he is a moderate Muslim with no interest in violent jihad against any country. He argues that his possession of weapons was lawful and for legitimate recreational purposes, that he played paintball with other named co-conspirators for physical exercise, that he did not know the LET camp he and others visited in Pakistan trained persons for violent jihad, and that he had no intention himself of fighting India or any other nation and no intention of helping others engage in such fighting. Defendant Abdur-Raheem similarly argues that his possession of firearms, his training co-conspirators about the safety and maintenance of their firearms, and his participation in paintball were for purely recreational

purposes. He disavows knowing the intention of other paintball players to use the game as a preparation for violent jihad. He also argues that he was never a part of any of the conspiracies. Defendant Khan argues that he was not a part of the paintball group and that his trip to Pakistan was for the purpose of settling a family legal problem. He argues that the time he spent at the LET camp was purely recreational and he disavows any intention to go to Afghanistan to fight on behalf of the Taliban against the United States.

The evidence as to each defendant's involvement in each count is entitled to separate evaluation and the evidence supporting or undercutting each count must be considered on its own merits. Due to the sharp conflict over the knowledge and intention of the defendants, the Court necessarily must determine what each defendant knew and intended. Because we cannot look directly into the human brain or heart to make such a determination, the Court has relied on evidence of what the defendant has said or done, or failed to say or do, during and around the time period at issue in the indictment, which runs from January 1, 2000 through June 2003. The Court has also used both the direct and circumstantial evidence that it found to be reliable and drawn from that evidence reasonable conclusions justified in light of common sense. Lastly, the Court has judged the credibility of the witnesses who have testified. The evaluation of witness credibility in this case has been based in what the witness said; his demeanor while on the witness stand; the extent to which the testimony has been substantiated or contradicted by other evidence in the case, including the testimony of other witnesses; the degree to which the witness may have been impeached; any relation the witness may have to either side of the case; and any motive, such as a plea bargain, to testify either truthfully or falsely. Two defendants, Abdur-Raheem and Chapman, testified. The credibility of their testimony has been evaluated using the same principles that apply to any other witness. Defendant Khan exercised his Fifth Amendment right not to testify and no inference has been drawn from that silence. Based on this evaluation, we have found the following facts.

*A. How the defendants met*

All the defendants on trial and their co-conspirators are Muslim, who met each other at different times. Abdur-Raheem

met co-defendants Caliph Basha and Surratt and witness Maurice McCoy at Prince George's Community College around 1996. They started a Muslim student group there. In 1998 Abdur-Raheem moved to Northern Virginia and transferred to the Northern Virginia Community College ("NOVA"). Caliph Basha introduced Abdur-Raheem to Nabil Gharbieh some time before 2000. Gharbieh was a devout Muslim who along with Sheikh Jaafar and Ali Al-Timimi set up the Dar al-Arqam Center ("the Center") in Falls Church, VA. Gharbieh testified that the purpose for establishing the Center was to provide instruction*803 on Islam in English, rather than Arabic, to improve local Muslims' understanding of their religion. Kwon, a Korean convert to Islam, met Al-Timimi and Royer in 1997 at a convention. Kwon met Aatique and Omar Khan, the brother of defendant Masoud Khan, while they were students at Virginia Tech in the late 1990s. Kwon often stayed at the Khan residence and became a close friend of defendant Masoud Khan. Kwon met Abdur-Raheem, Caliph Basha, Surratt, Al-Hamdi and Gharbieh at the Center. He met Chapman through a friend before going to the Center. All the defendants knew each other by the dates of the conspiracy.

*B. Paintball*

It is uncontested that Nabil Gharbieh came up with the idea of playing paintball. He and Kwon both testified that in early January 2000 after dining with Al-Timimi, the two of them discussed setting up a paintball group as a way of doing jihad. Jihad literally means a struggle, which may range from exercising self-discipline, such as controlling one's appetite, to violent combat against perceived enemies of Islam. Gharbieh, who the Court found to be a very credible witness, testified clearly that in early 2000, the war in Chechnya was a very "hot topic" among Muslims and was regularly discussed in the mosques and on Arabic satellite television. When he and Kwon discussed setting up paintball as a vehicle for jihad, their intention was to prepare for physical jihad in the sense of physical preparation for possible combat. They relied upon the Koran's teaching that Muslims must be proficient in the use of the crossbow, horseback riding, and swimming for their view about the requirement of being physically prepared for combat.

Kwon and Gharbieh spoke to other Muslim men they knew from the Center about paintball. These people included

defendants Abdur-Raheem and Chapman and co-conspirators Royer, Al-Hamdi, Aatique, and Caliph Basha. Chapman was not as regular an attendee at the Center as the others, but was well enough known to be invited to join. Khan, although well-known to Kwon, who had lived at the Khan home, was not a member of the paintball group.

Kwon made the initial purchases of the paintball equipment in the spring of 2000. By early summer the paintball games were a regular occurrence every other weekend. Initially played at public courses, the games were moved to private farm land in Spotsylvania County. Because Abdur-Raheem, Chapman, and Surratt had prior military experience, they were asked to lead the paintball teams and train the players to improve their game. Although the defendants have tried to portray the paintball exercises as innocent fun, the Court concludes that for the defendants and their co-conspirators, these games were viewed as not just an opportunity for outdoor exercise, fellowship, and an opportunity to improve self-defense skills, but also as preparation for real combat. The Court bases this conclusion on the following facts.

The witnesses consistently testified that violent jihad in Chechnya was actively discussed by the paintballers. The players shared videotapes of war and their paintball Website, which was password protected, was used to disseminate information about jihad. To improve their paintball skills, the group asked those with military experience, Surratt, Abdur-Raheem, and Chapman, to lead drills. Both Abdur-Raheem and Chapman testified that they did lead these exercises.

In September 2000, Chapman was visited by two FBI agents at his job site on the NOVA campus and asked about the paintball activity. Chapman testified that he told the agents all about the activity and *804 that this candor demonstrates his understanding that the games were not violating any laws. That argument is undercut by testimony of other witnesses who testified that after Chapman was interviewed, the paintball activity continued but with heightened secrecy. For example, Aatique joined the paintball group in the summer of 2000 after being invited to join. He testified that in the second season [FN4], the games were more secretive. New players had to have two or three sponsors and were told not to speak to the police if questioned about paintball.

FN4. Paintball was not played during the winter, both because of cold weather and because it was dangerous to wear camouflage in the woods during hunting season. The first paintball season ended in late October 2000. The second season began in spring 2001 and ended as of September 11, 2001.

The defendants have tried to downplay the secrecy and the seriousness of the games. However, an outside observer of the games, Yusuf Wells, provided extremely reliable evidence that corroborates Aatique's testimony. Wells, who was a fund raiser for the Benevolence International Foundation, an Islamic relief organization, visited Gharbieh in Northern Virginia over the April 14-15, 2001 weekend. On April 15, 2001, Gharbieh brought him to a paintball game. Part of Wells' job involved writing reports about his fund raising trips. In his April 15, 2001 report he states:

I was taken on a trip to the woods where a group of twenty brothers get together to play Paintball. It is a very secret and elite group and as I understand it, it is an honor to be invited to come. The brothers are fully geared up in camouflage fatigues, facemasks, and state of the art paintball weaponry. They call it "training" and are very serious about it. I knew at least 4 or 5 of them were ex U.S. military, the rest varied.

Most all of them young men between the ages of 17-35. I was asked by the amir of the group to give a talk after Thuhr prayer. I spoke about seeing the conditions of Muslims overseas while with BIF, and how the fire of Islam is still very much alive in the hearts of the people even in the midst of extreme oppression. I also stressed the idea of being balanced. That we should not just be jihadis and perfect our fighting skills, but we should also work to perfect our character and strengthen our knowledge of Islam. I also said that Muslims are not just book reading cowards either, and that they should be commended for forming such a group.

Many were confused as to why I had been "trusted" to join the group so quickly, but were comforted after my brief talk. Some offered to help me get presentations on their respective localities.

(G Ex. 7C1 at 5-6) (emphasis in original).

The defendants have tried to discredit this report by arguing that Wells was not accurate in his reporting and only trying to impress his supervisor. We find no support for that argument.

Wells' observation about the secretiveness with which paintball was played is corroborated by Gharbieh's testimony describing the rule restricting new players to those known by the group, and the need for secrecy because outsiders might view them as terrorists. Andre Thompson testified that Surratt brought him to the paintball group in the summer of 2000 and told him that to continue to play he had to follow three rules: don't tell anyone, don't bring anyone, and take the Fifth if questioned by the police. Thompson was surprised by the rules, but Surratt explained that the rules were needed because Muslims were under surveillance. Surratt also *805 said someone would call him. Kwon called Thompson and asked him if he knew the rules, and after that Thompson became a regular player.

Wells' observations about the intensity of the players and some players' views about paintball preparing them for jihad are corroborated by the testimony of numerous witnesses. Thompson testified that the fighting in Chechnya was discussed on the paintball field constantly. Some players such as Al-Hamdi openly discussed wanting to go to Chechnya to fight. Royer encouraged Al-Hamdi, and also described paintball as a means for helping them prepare to fight. Thompson described Chapman as saying that paintball would enable them to fight but was not sufficient to qualify a person to fight overseas. Thompson also testified that Chapman once described paintball as a stepping stone to real training, and Abdur-Raheem said similar things about paintball-that it had application to real fighting but was not equivalent to it.

Thompson also described military-type drills conducted by Chapman, Abdur-Raheem, and Surratt, all of whom had previous military experience. One time Chapman e-mailed pages from a military training manual to the players, then asked if they had memorized the pages. Abdur-Raheem and Chapman taught flanking maneuvers and land navigation. Warmups included military-like calisthenics including duck walks and push-ups, with physical punishment such as pushing a car in neutral for those coming late. Chapman enforced the punishment.

Surratt's testimony echoed Thompson's description of the games and supported Gharbieh's opinion that the games became more serious over time. When Chapman took over training during the summer of 2000, it became intense with Chapman telling the group "we're going to learn to fight." Surratt described

Chapman as enforcing discipline on late comers. Surratt also admitted that he provided military training out of his boot camp book. He taught assault and retreat and defend techniques, formations and hand signals. By the spring of 2001, Surratt had become concerned about the legality of what they were doing because of the cliquishness of the group, and his knowledge that Royer and Al-Hamdi had attended jihad training camps in Pakistan. He was also concerned about some of the players constant talk about really wanting to implement their training overseas. Surratt discussed his concern with Abdur-Raheem who said there was nothing illegal about their activities and that they were doing nothing more than the Michigan militia. After that discussion, he and Abdur-Raheem decided to continue playing paintball-they felt if someone went overseas and got in trouble that was not their problem.

Aatique testified that he understood a purpose of the paintball games was to get military training for jihad and that Kwon and Al-Hamdi specifically told him they were training for jihad. He learned on the paintball field that Al-Hamdi planned to go to a Pakistan camp to fight in Kashmir and ultimately die shaheed.[FN5] Other paintballers*806 were present at this discussion. Aatique testified that when Al-Hamdi returned from Pakistan in September 2000, the players were surprised to see him alive. Al-Hamdi described his camp experiences and afterwards continued to play paintball. Every witness who testified on the subject described Al-Hamdi as an improved paintball player after he returned and he even served with Chapman as team captain.

FN5. According to the defendant's expert on Islam, Mohammad Arafa, to die shaheed means to die in a state of jihad, which does not necessarily mean combat because jihad includes all struggles, not just violent ones. However, in Al-Hamdi's testimony he described shaheed as dying in combat. The government introduced documentary evidence extolling death while battling on behalf of Islam as the highest form of shaheed, resulting in greater rewards, including rewards for family members. This view of shaheed undercuts Chapman's argument that he would not have encouraged a marriage between Al-Hamdi and Chapman's sister-in-law had Chapman known that Al-Hamdi planned to die shaheed.

Aatique also described how Abdur-Raheem during a training drill once shouted "helicopter." The players did not know how to respond. After shooting in the direction of the aircraft, they were told by Abdur-Raheem why that response was incorrect. Abdur-Raheem testified about this incident and admitted that he gave the command, but argued that it was intended as a joke, knowing the players would be confused. Even though Aatique confirmed that Abdur-Raheem and Surratt laughed about the incident, he also testified that he did not view the exercise as a joke and that when another player asked how they should respond to a helicopter attack, Abdur-Raheem explained what they should do quite seriously.

As further evidence of the true nature of the paintball games, we rely on the testimony of FBI Special Agent John Wyman about his debriefing Caliph Basha on March 23, 2003. In his first interview, Caliph Basha told the agents that the paintball was for fun, not military training, that Surratt and Abdur-Raheem led the teams, and that although Chechnya was often discussed, no one spoke about going overseas to fight or tried to get him to fight. Thirty minutes later, after agents challenged Caliph Basha about his truthfulness, he changed his story. He stated that paintball was intended as training for jihad, so that the men could be prepared if something happened.

The defendants argue that their involvement in paintball was completely innocent. They called Jessica Sparks, an expert on the game of paintball, who explained that all the military-type tactics are just part of the game. Sparks described the physical rigors of the game, the need to do warm-ups, and the regular use of drills such as flanking. The Court found all of Sparks' testimony credible. However, it did not address the real issue of the defendants' intent in engaging in these activities. Moreover, on rebuttal, the government called Major David Laden, responsible for basic training at the United States Marine Corps base at Quantico, Virginia, who confirmed that starting in 1999, the Marine Corps used paintball as part of its training program. Consistent with how Abdur-Raheem and Chapman described paintball to the co-conspirators, Laden explained the benefits of paintball as a stepping stone to further military training. According to Laden, paintball is not the equivalent of real combat, but it simulates aspects of real combat, such as learning how to

move under fire. It also provides instantaneous feedback when a player makes a mistake, because he feels the sting of being hit by a paintball.

Based on the totality of the evidence, the Court finds that the paintball exercises were an integral part of many of the conspiracies charged in this case, as they were treated as part of training for violent jihad.

*C. Lashkar-e-Taiba*

As with their participation in paintball, the issue as to what the defendants knew and intended with respect to their involvement with Lashkar-e-Taiba is also disputed..

Markaz Dawa Wa'al Irshad was founded to organize Pakistani Muslims to conduct violent jihad against Russians in Afghanistan. Eventually it divided into separate *807 sections. The military wing, known in this case as Lashkar-e-Taiba ("LET"), during the 1999-2003 period was primarily focused on defeating India's influence in Kashmir (G Ex. 1D49). Through the numerous Taiba Bulletins, or LET newsletters, entered into evidence, it is clear that the LET was engaged in violent actions against Indian forces. For example, on April 23, 2000, the Taiba Bulletin announced in part:

The mujahideen continued "Operation Ghauri" in Kupawara, in the village of Gung in the LOLAB area. They attached a mine under a bridge and took up positions around it. As an Indian military bus convoy passed over it, the mujahideen detonated the mine by remote control; the explosion sent one bus over the side of the bridge and into a deep trench, destroying it. The mujahideen then opened fire with assault rifles on the remaining buses. Several Indian soldiers died....

In the capitol of Occupied Kashmir, Lashkar-e-Taiba's Fidai Brigade launched their third attack in recent days on the Indian "Nogam Brigade" Headquarters, located in Kupwara district. Three mujahideen entered the camp and immediately killed the two guards on duty. Then they fired two disposable shoulder-launched rockets at the main building, destroying a major part of it. One mujahid positioned himself at the gate to stand watch, while the remaining two entered the partially demolished main building and began shooting Indian soldiers. This caused many Indian soldiers to flee in panic from the building towards the camp's gate. The mujahid stationed at the gate subsequently opened fire on them, resulting in a scene of fearful shouting,

crying and shrieking. This furious battle continued for forty-five minutes, resulting in the deaths of eleven Indian soldiers and the serious injury of six. Before tactically retreating from the military camp, the three mujahideen set fire to an Indian military oil tanker, resulting in the complete wastage of its oil.

(G Ex. 1D3). The Taiba Bulletins contain a footer with the following contact information: TAIBA BULLETIN is an official publication of MUJAHIDEEN LASHKAR-E-TAIBA5 Chamberlane Road, Lahore-Pakistan Tel: (92-42) 741-2565Fax: (92042) 741-1242Http://www.dawacenter.com/

Email: markazdawa@hotmail.com

Requests for information about the jihad in Kashmir are welcome.

This phone number was listed on a paper seized in a search of Royer's home (G Ex. 1A9, Stip. 8-2) and a business card seized from Al-Hamdi's home (G Ex. 3A12, Stip. 8-13). Other Taiba Bulletins discussed possible jihad actions against Russia (G Ex. 1D11) and Jews (G Ex. 1D27).

The nature of LET is critical to this case because seven of the persons named in the indictment, including Chapman and Khan, spent time at LET camps in Pakistan. As early as April 2000 Royer traveled to LET. He later told Surratt that it was a good group, not engaged in terrorism but fighting for Muslims in Kashmir. Al-Timimi also praised the group. After those discussions Surratt began researching LET on the web. He did not need any help in locating the Taiba Bulletins.

Al-Hamdi testified that he had dreamed of dying shaheed since he was twelve years old, and he attended the LET camp in pursuit of this goal. After seeing some videotapes about jihad, he tried to get into Chechnya to fight for the Muslim forces, but was turned away because he lacked jihad training. Early in 2000 he met with co-conspirator Royer to discuss how to get such training. Royer told him about LET *808 as a "straight path" for such training. In a second discussion Royer told him that the LET was actively fighting the Indians in Kashmir. The two of them decided to go to Pakistan to get LET training. Royer went to LET in April 2000 (G Ex. 1A1). Because Al-Hamdi was the son of a Yemeni diplomat, his visa application was delayed. When Royer returned, which had to be in May 2000, he told Al-Hamdi at the Center about his training experiences with LET, including firing live rounds on the front lines, endurance training, and firing AK-47

and PK weapons. In a meeting at the Center, Royer spoke to a group including Abdur-Raheem about LET and the training it provided. Al-Hamdi testified that Royer freely discussed his jihad experiences both in Bosnia and at the LET camp, both during paintball and at the Center. Al-Hamdi's testimony about wanting to die shaheed was corroborated by Kwon who described Al-Hamdi as being ashamed that he did not know anyone who had died shaheed and how he wanted such a death. Al-Hamdi finally got a visa and left for Pakistan on August 21, 2000 (G Ex. 3C2). Before leaving, Royer made a call to the LET officials introducing Al-Hamdi and gave Al-Hamdi a business card (G Ex. 3A12). Al-Hamdi was sure he told Khan, Abdur-Raheem, Kwon, and other paintballers the real reason he was going to Pakistan just before he left.

Aatique confirms that testimony. He testified he heard about Al-Hamdi's plan to go to LET and die shaheed, before Al-Hamdi left. Although he could not recall who was present, he was sure other players were around. Afterwards there was a general discussion at the paintball sessions about Al-Hamdi's trip. Aatique first saw Al-Hamdi again at the Center after he returned from LET in September 2000. Aatique testified that Al-Hamdi and some of the paintballers walked off together so Al-Hamdi could tell them privately what he had done. He remembered Abdur-Raheem and Chapman being among those paintballers. Gharbieh noticed them and warned them not to congregate like that. Everyone was surprised to see Al-Hamdi because they had expected he would die fighting.

Al-Hamdi confirmed Aatique's account by testifying that after he returned from LET he attended a meeting at the Center. He recalls Abdur-Raheem and Caliph Basha being present, with Chapman joining them later. Although Al-Hamdi later admitted embellishing what he actually did at LET, he told those present about firing weapons and being fired at. This evidence is credible and seriously undercuts the defendants' argument that they were unaware that members of their group were attending jihad camps overseas.

Al-Hamdi, Aatique, Hasan, and Kwon testified about the posters they saw at the LET office in Lahore. One poster included the LET flag, along with a rifle firing through a burning balloon marked with the Indian flag, and balloons marked with American

and Israeli flags next to it. The text reads, "Yesterday we saw Russia disintegrate, then India, next we see America and Israel burning" (G Ex. 1F3). Another poster shows the LET flag flying, a boot on an American flag, and the United States Capitol in flames (G Ex. 1F4). Another shows an LET flag and a soldier with an LET patch on his shoulder firing a rifle at burning Indian, American, and Israeli flags (G Ex. 1F6).

Chapman testified that he traveled to the LET camp in August 2001. Royer suggested the camp to him, saying that LET were good Muslims who provided free military training and that the mountains were scenic. Royer called his LET contact from Chapman's home phone to arrange Chapman's visit. Chapman testified that he did not see any anti-American posters at the LET offices in Lahore, which we *809 find incredible considering the consistent testimony of four other witnesses that such posters were prominently displayed. Chapman spent about 30 days at the camp-3 days in weapons training, where he fired an AK-47 and other firearms, and the remainder of the time hiking in the mountains and performing military drills. On September 11, 2001, he learned of the attacks on America through a report on BBC radio, and began his journey back to the United States.

*D. The September 11, 2001 meeting*

Prior to September 11, 2001, a meeting had been scheduled at the Center for that evening. Given the events of that day, the gathering turned into a discussion of the attacks. Several of the conspirators attended. Gharbieh, Surratt, and Haytham Abu-Hantash, one of the founders of the Center, testified to a verbal altercation between Al-Timimi and Hantash. Gharbieh and Surratt testified that Al-Timimi stated that the attacks may not be Islamically permissible, but that they were not a tragedy, because they were brought on by American foreign policy. Both witnesses also testified that Hantash responded angrily that the attacks could not be justified. Hantash, who was called as a defense witness, also testified that such an exchange occurred. Hantash characterized it as Al-Timimi making a scholarly quibble with Hantash's statements that attacks on innocents are never Islamically permissible. Al-Timimi cited authority that innocent persons may be attacked if an enemy is using them as human shields. Hantash told Al-Timimi that such comments were not appropriate immediately after the attacks, and reiterated that the

attacks were to be condemned. Although Hantash tried to minimize Al-Timimi's comments as scholarly quibbles, both Gharbieh and Hantash testified that Al-Timimi was not invited to speak at the Center after September 11, and the Center purged its bookstore of all speeches by Al-Timimi. Both the defendants and the government introduced speeches by Al-Timimi into evidence. Although in one speech from 1993 Al-Timimi condemns terrorism and the airplane hijackings (K Ex. 117), the more recent speeches that Al-Timimi gave at the Center endorse violent jihad (G Ex. 2A10, 4A12, 4A14). Among the topics of Al-Timimi's lectures at the Center was the "end of time" battle between Muslims and non-Muslims.

*E. The September 16, 2001 meeting*

Kwon testified that after September 11 he organized a meeting at the urging of Al-Timimi to address how Muslims could protect themselves, and invited only those brothers who had participated in paintball training and owned weapons. Attendees at this September 16, 2001 meeting included Kwon, Al-Timimi, Royer, Aatique, Hasan, Caliph Basha, Gharbieh, Khan, and Abdur-Raheem. Chapman was in an LET camp at that time.

The government presented testimony about this meeting from Gharbieh, Aatique, Hasan, and Kwon. We find the accounts of the first three witnesses fully credible, because the demeanor of the witnesses was candid and their separate accounts generally consistent. Although we are troubled by some inconsistencies in Kwon's testimony, we credit his testimony to the extent it is corroborated by the testimony of the other three witnesses. Abdur-Raheem discussed the meeting during his own testimony, and his account is generally consistent with that of the cooperating witnesses.

At the beginning of the meeting, Al-Timimi told the attendees that the gathering was an "amana," meaning that it was a trust that should be kept secret. The secrecy was underscored by having the window blinds drawn and the phones disconnected *810 from the wall. The secrecy of the meeting was further reinforced when Gharbieh arrived with "Sherdil," who was not a member of the paintball group and was not well-known to other attendees. When Gharbieh and Sherdil arrived, discussion stopped, Royer asked Gharbieh why he had brought Sherdil, and the discussion did not resume until Gharbieh and Sherdil left.

At the meeting, Al-Timimi stated that the September 11 attacks were justified and that the end of time battle had begun. He said that America was at war with Islam, and that the attendees should leave the United States. The preferred option was to heed the call of Mullah Omar, leader of the Taliban, to participate in the defense of Muslims in Afghanistan and fight against United States troops that were expected to invade in pursuit of Al-Qaeda. As support for this proposition, Al-Timimi cited "fatwas," or religious rulings, that called on Muslims to defend Afghanistan against impending American military action (G Ex. 7A20, 7A20a). According to Hasan and Kwon, Khan asked to review the fatwa, and Al-Timimi gave it to him to read, but advised Khan to burn it after he had read it. The other option presented to the attendees was to make "hijrah," that is, to relocate their families to a Muslim country. Royer said that anyone who wanted to fight in Afghanistan would first need to participate in military training, that the LET camps in Pakistan were a good place to receive that training, and that Royer could facilitate their entry to the LET camps.

After the meeting, Khan, Kwon, Aatique, and Hasan agreed to go to LET for training. Aatique, Hasan, and Kwon admitted that each of them had the intent to receive training that would allow him to proceed to Afghanistan and fight on behalf of the Taliban and Mullah Omar against United States troops. The evidence does not, however, establish any intent to fight in other regions, such as Kashmir or Chechnya, or to fight on behalf of LET.

*F. Trip to LET camp*

Aatique had already planned a trip to Pakistan to pick up his family, who had been visiting Pakistan during the summer, and he told the other attendees that he would attend the LET camp during his trip to Pakistan. Upon learning of Aatique's travel plans, Khan arranged to take the same flight to Pakistan, leaving from JFK airport in New York. Hasan and Kwon also made plans to travel to Pakistan. Hasan and Khan made plans to meet in Karachi before traveling to LET together. In preparation for the trip, Kwon ordered jackets from a catalog for himself, Hasan, and Abdur-Raheem,[FN6] because Khan recommended such a jacket for the mountain climate in Pakistan where the LET camps were located. Khan had ordered an identical jacket for himself one day earlier.[FN7] Royer phoned his contact in LET and provided aliases

and descriptions for Khan, Aatique, Hasan, and Kwon. Several witnesses testified that Khan's alias, or "Abu name," was "Abu Ibrahim." Ibrahim is the name of Khan's son, and the convention in forming "Abu names" is to use the name of a son. On *811 September 18, 2001, Hasan and Kwon drove Khan to Aatique's house in Pennsylvania. The next day Aatique and Khan traveled to JFK airport for their flight to Karachi. The conspirators discussed "cover stories" that they could use to disguise the true purpose of their trip. Khan maintained that his travel was to testify in a court proceeding, Aatiqu cited his plan to pick up his family, and Hasan and Kwon said that they planned to attend a wedding. Al-Timimi advised Hasan and Kwon on how to travel without drawing attention to themselves.

FN6. Abdur-Raheem never traveled to the LET camp, and several witnesses testified that Abdur-Raheem never expressed the intention to do so. He explains that he purchased the same jacket as the others because it seemed to be a good bargain.

FN7. The government argues that these jackets are significant because they are obviously intended for cold weather, which would not be consistent with the climate in Karachi where Khan's family lived, but would be consistent with the climate in the mountains where the LET camps were located.

After arriving in Karachi, Khan, Hasan, and Kwon met and traveled together to the LET office in Lahore. Aatique had already traveled to Lahore, and for a day or two the four were at the LET camp together. During their time at LET, Khan, Hasan, and Kwon traveled through several different camps and received training on commando tactics and weapons. Aatique saw Khan fire an anti-aircraft gun, and Hasan and Kwon testified that both they and Khan fired an AK-47, an anti-aircraft gun, and a rocket-propelled grenade. Khan did not submit any evidence that would refute the evidence that he fired these weapons at the LET camp, nor did he impeach the consistent accounts of the witnesses. Moreover, the accounts of these witnesses as to their activities at the LET camps are consistent with the accounts of Al-Hamdi and Chapman, who attended the LET camps at other times. Therefore, on this evidence we find that Khan fired an AK-47, an anti-aircraft gun, and a rocket-propelled grenade at the LET camps.[FN8]

FN8. We accept the defendants' evidence that the firing of these weapons was highly limited in that very little ammunition was provided. It is also clear that the LET camp system was graded, so that as one went up the mountains the camps became more intense, with the final camp being the one where final preparation for jihad in Kashmir occurred. Kwon discussed this structure in detail. We accept that the defendants in this case never attended the final camp as evidence that they never took the final step in joining LET's attacks on Indian positions in Kashmir, a Neutrality Act violation. However, their participation in the lower camps is evidence supporting their participation in the conspiracies alleged.

*G. Khan's and Chapman's support to LET*

During their time at LET, Khan, Hasan, and Kwon learned through reports on BBC radio that United States forces were defeating the Taliban in Afghanistan, and also learned that Pakistan had closed its border with Afghanistan and that LET would not facilitate their travel there. Moreover, Pakistani authorities were aggressively removing foreigners from the camps. As a result, the defendants were required to leave the camps. Both Hasan and Kwon communicated their regret over the early termination of their training. According to Kwon, before he and Khan left the camp, they were approached by two men Kwon knew as "Abu Baraa" and "Disco Mujaheddin," who requested their help with a special mission but declined to give specifics. Ultimately, Abu Baraa and Disco Mujaheddin asked Khan and Kwon to return to the United States, gather information, and spread propaganda. Khan returned to the United States in December 2001 but Kwon stayed in Pakistan and started a mango export business.

Both Kwon and Chapman testified about their contacts with a man they encountered at the LET camp known as "Abu Khalid." Khalid was described as a Pakistani man who spoke English with a British accent, and worked at the LET office in Lahore. On rebuttal, Kwon testified he believed Khalid was a high official in LET because he had a driver. By the summer of 2002, Kwon had overstayed his visa in Pakistan. He believed that Abu Khalid might be able to help with the visa problem,*812 but Kwon did not have a way to contact him. Kwon e-mailed Khan to request

Abu Khalid's contact information. Khan passed the request on to Chapman, who sent Kwon Abu Khalid's e-mail address: johninformation@yahoo.co.uk. This 2002 contact with Khalid and LET was extremely significant in our view, because it undercuts Chapman's argument that his early return to the United States after September 11, 2001 evidenced his disavowal of any further contact with LET, which the United States Department of State had officially declared a terrorist organization in December 2001.

Chapman testified that Abu Khalid, who used the johninformation e-mail account, is the same person as Pal Singh, who uses the email address of psingh @hotmail.com. Chapman's testimony that Abu Khalid and Pal Singh are the same person is buttressed by technical evidence that the government introduced through Evan Kohlmann, a witness familiar with the Internet sites routinely accessed by the co-conspirators and with Internet addressing protocols generally. The johninformation@yahoo.co.uk account was created in the summer of 2001 from an Internet connection at Coventry University in England, by someone using the alias "John Smith" (G Ex. 4C4a). As discussed below, Chapman shipped video equipment for a model airplane to Pal Singh in Coventry, England.

Other technical evidence introduced through Kohlmann was that the psingh @hotmail.com account was accessed in 2003 from Pakistan, Hong Kong, and College Park, MD (G Ex. 5A6a, 7C17). Based on this evidence, and because Kwon encountered Khalid in Pakistan and Chapman encountered Singh in the United States, we draw the inference that Singh routinely travels between Pakistan, the United Kingdom, and the United States.

On March 27, 2002, Pal Singh tried to purchase a wireless video module for use in a model aircraft over the Internet from www.wirelessvideocameras.com. For descriptions of the following transaction, we rely on the testimony of Monte Salot, the President of Wireless Video Cameras, as well as documents and e-mails regarding the transaction maintained by that company (G Ex. 4C3). Chapman's testimony confirmed most of this evidence.

As the documents establish, Singh purchased an AA5 OR-2 airborne video system, which includes a camera and transmitter that can be installed in a model airplane and will transmit video images back to a receiver from as far away as 5 miles. The range can be extended to 15 miles with use of an amplifier, which was

included in the system that Singh ordered. The return address on the e-mail order shows that Singh placed his order from Coventry, England, but the vendor was unable to confirm the overseas credit card and notified Singh of this problem by e-mail to psingh@hotmail.com. Singh responded to that e-mail by phone, explaining that Seifullah Chapman in Alexandria, VA would purchase the device on Singh's behalf and that the vendor should ship it to Chapman. Chapman admits that he agreed to make the purchase for Singh. Chapman paid the $986 charge from his debit card account, as shown by the record that was the subject of the Motion to Suppress discussed in section I.B., *supra.* Once payment was confirmed, the vendor shipped the system to Chapman on April 8, 2002, and Chapman forwarded it to Singh in Coventry.

In the summer of 2002, Singh advised the vendor by e-mail that he was having problems with the system and that it was not transmitting video over the range that had been promised. After some troubleshooting advice failed to solve the problem, *813 Singh shipped the system back to the vendor, who discovered that the wrong type of battery had been installed, replaced the battery, and returned the device to Chapman at his new address in Alexandria on July 10, 2002. Chapman testified that about a month before, Singh had contacted him and asked for a place to stay when visiting the Washington, D.C. area. Because Chapman had a newborn child and was busy with work, he only agreed to host Singh for two days, and arranged for Singh to stay with Khan for a few more days.[FN9] Sometime after this visit, Chapman received the repaired video device from the vendor. By this time, he was preparing to leave the country for his job teaching English in Saudi Arabia. Because Chapman was giving some of his hunting equipment to Khan's brother Ahmed, and because Chapman knew Singh had been to Khan's house before, he brought both the hunting gear and the video device to Khan's house, with the understanding that Singh would pick up the video device from there. Given Singh's relationship with LET, Chapman's continued involvement with him in 2002 is strong evidence of providing material support to LET.

FN9. Chapman explained that Muslims are supposed to host guests for three days.

In December 2002, Khan purchased from Vesta Technologies an MP-1000SYS airplane control module. According to the testimony of Cindy Reish, general manager of Vesta Technologies, and the documents regarding the transaction maintained by that company (G Ex. 2C2a), the MP-1000SYS is a stability and control computer that can be programmed to fly an airplane with a 10-12 foot wingspan using Global Positioning System ("GPS") coordinates. The unit controls altitude, speed, and navigation to programmed waypoints, and can also be programmed to turn a video camera on and off when the airplane reaches certain locations. The majority of Vesta's customers for this technology are universities and the government, including NASA and the military. Common applications of the technology are using model airplanes equipped with video devices to monitor forest fires, property boundaries, gas lines, or livestock in remote or inaccessible areas.

Khan first attempted to order the device from Vesta by telephone in December 2002. According to Reish, Khan stressed the urgency of receiving the device before the end of December, and seemed reluctant to fill out paperwork. Reish insisted that Khan fill out the appropriate paperwork, and faxed him an order form on December 11, 2002. Although Vesta is not required to conduct due diligence on domestic purchasers, Reish was suspicious enough of the transaction that she also requested that Khan answer export control questions on the order form. Khan completed the paperwork and faxed it back to Vesta. On the form he listed his address in Gaithersburg, MD and phone number, and indicated that the intended use was "Radio Controlled (RC) model aircraft pilot assist." Other potential uses listed on the form, not selected by Khan, included "Commercial robotic aircraft" and "Military Unmanned Aerial Vehicle." Vesta checked Khan's name against lists of prohibited purchasers for export, and not finding him listed, shipped the device to Khan on December 30, 2002.

Both Salot and Reish testified that the wireless video equipment purchased by Chapman and the airplane control module purchased by Khan are compatible with one another, and that the two types of equipment are commonly used together on model airplanes.

Neither the wireless video device that Chapman purchased for Singh nor the airplane control module ordered by Khan *814 were found in the search of Khan's home, and Khan submitted no evidence to indicate the disposition of either. From other evidence in the record, however, we conclude that Khan transferred both devices to Singh. Specifically, the government introduced an e-mail on Khan's computer dated November 28, 2002 from johninformation @yahoo.co.uk asking Khan to order an MP-1000SYS and paintball equipment, and stating, "THANKS BRO DO THIS ASAP AGAIN ASAP ILL TRY NOT TO BOTHER U AGAIN THE MONEY SHOULD BE IN UR ACC CONTACT ME IF NOT" (G Ex. 2A20a). Days later, Khan placed the order with Vesta. Moreover, the home phone number that Khan listed on the Vesta order form is the same as the phone number listed for "ibrahim staates" [sic] in an e-mail seized from the johninforma'ion@yahoo.co.uk account (G Ex. 4A3). As discussed above, at LET Khan used the alias Abu Ibrahim. Lastly, no evidence was introduced to suggest that Khan had any hobby interest in model airplanes.

We find, based on both Chapman's and Kwon's testimony, that Singh a/k/a Abu Khalid plays a major role in LET operations. The significance of the evidence that Chapman and Khan both provided model airplane and wireless video equipment to an LET operative is demonstrated by the Taiba bulletin dated June 11, 2000 which stated, "Lashkar-e-Taiba also made a remote control aeroplane that was caught in Occupied Kashmir. We are developing the modern technology. We can make modern devices." (G Ex. 1D16). From this evidence, we draw the inference that Singh's procurement of model airplane equipment was for LET's military use in Kashmir. Because Khan knew of Singh's connection with LET and balked at completing paperwork, we find that Khan was aware and intended that his straw purchase of the autopilot module was for LET's military use.

*H. Evidence relating to Abdur-Raheem*

Abdur-Raheem testified that although he was raised Christian he became interested in Islam while serving in the United States Army and officially converted in 1994. After being honorably discharged he moved to Maryland in 1996 to attend Prince George's Community College. Although the defendant spoke in a

quiet, calm voice that would appear inconsistent with a person inclined to pursue violent jihad, the Court finds that defendant's written statements, activities supporting fighters in Chechnya, actions on the paintball field, and incredible testimony support the government's view of his activities.

Before 1999 Abdur-Raheem had become preoccupied with what he perceived to be Russian oppression of Chechen Muslims. Because he was upset to hear Muslims called terrorists when they opposed aggression, he began to research areas of the world such as Bosnia and Chechnya where Muslims were fighting. Through a series of e-mails with a Chechan official known in this case as John Doe, Abdur-Raheem exhibited a strong commitment to furthering militant jihad. For example, on September 23, 1997 John Doe e-mailed defendant that "the best way to get into Chechnya is through Georgia" and offers to send contact information (G Ex. 5G2).[FN10] On October 2, 1999, defendant sent John Doe an e-mail to explain that he had created a business under the name of Chechan Zakat, *815 P.O. Box 90951, Washington, DC, with the e-mail address of chechenzakat@hotmail.com and set up a bank account (G Ex. 5G3). On November 5, 1999 Abdur-Raheem applied for a Certificate of Fictitious Name from Fairfax County, Virginia under the name Chechan Zakat, listing the purpose of the organization as "charitable" (G Ex. 5C7). Contrary to what he wrote on his application for that certificate, defendant wrote in an e-mail that the real purpose was to "provide assistance to the Islamic fighters (mujahideen) in Chechenia [sic]". Abdur-Raheem wrote in another e-mail: "Officially, I am helping the refugees of Chechenia. In reality, however, I am helping the Mujahideen.... When I send money, I must send it in small amounts at a time to avoid attracting the enemies of Islam.... Also, after you have read the messages please erase them. I really don't need the wrong person getting a copy of the messages." (G Ex. 5G5).

FN10. The government argues that this e-mail establishes that Abdur-Raheem was trying to get to Chechnya to fight. Abdur-Raheem explains that it was just a response to a question. We find the government's interpretation more reasonable given the specific words in the e-mail.

On November 5, 1999, John Doe e-mailed Abdur-Raheem about a contact in Turkey to whom mujahideen funds should be

sent (G Ex. 5G6). On the same day Abdur-Raheem forwarded an e-mail to a person named Sattar concerning an interview with Ibn-Ul-Khattab, one of the mujahideen leaders in Chechnya. The article quotes Khattab saying that "Usama bin Laden is our brother in Islam. He is someone of knowledge and a Mujahid fighting with his wealth and himself for the sake of Allah.... It is an obligation for all the Muslims to take on the Jihad and fight for the sake of Allah.... Talking about the Jihad is not sufficient. You have to be in the battlefield in order to spread Islam and the correct information to the rest of the Muslim world." (G Ex. 5G7). This is the same Khattab who is shown in the Russian Hell 2000 video executing an unarmed Russian prisoner (G Ex. 3A8). That video was shared among the paintballers, including Chapman.

Some time in late 1999, Surratt and Abdur-Raheem met to discuss a plan to set up a separate pure Islamic community. Abdur-Raheem had been researching separate communities since 1994. Both Surratt and the defendant identified a document called "Things to Discuss" which sets out the goals for such a community and various concerns. The third item on the document is titled "Our Aim", under which is written "to prepare ourselves to be able to protect ourselves and our families." On the second page under the heading "Secondary Matters," the document lists "recruit or joining [sic] process of future members" and "address and stress the issue of not breaking any laws of the U.S.A." [FN11] Also listed are "plans for action if something kicks off" and "all join the NRA" (G Ex. 7A7). This document was in Surratt's possession as of May 8, 2003, when the FBI seized it. Whether by coincidence or planning, several co-conspirators including Kwon on October 6, 1999 (G Ex. 7C2), Abdur-Raheem and Surratt on February 24, 2000 (Exs. 5C6 and 7C4), Caliph Basha on March 9, 2000 (G Ex. 6C1), Gharbieh on April 13, 2000 (G Ex. 7C5), Al-Hamdi on May 6, 2000 (G Ex. 3C3), and Hasan on September 24, 2000 (G Ex. 7C3) joined the National Rifle Association ("NRA"), and on April 19, 2001 Chapman joined the Quantico Shooting Club. (G Ex. 4C7).

FN11. The defendant claimed responsibility for adding that issue, and cites it as proof he had no intention of violating United States law. However, the defendant's purported respect for law is contradicted by his false

statements on Virginia business documents that Chechan Zagat was a charity, signing false documents to cover the transfer of firearms among defendants (G Ex. 5A2, 1C1), and destroying his computer hard drive to hide potentially incriminating evidence and then telling FBI agents that the hard drive was missing due to technical problems.

*816 Abdur-Raheem also engaged in a stream of Internet bulletin board exchanges about jihad. These include a January 6, 2000 posting to the Chechnya Yahoo! Group under the subject "Islam and Christianity are at War!", about recent clashes between Christians and Muslims, and the locations throughout the world ("Egypt, Indonesia, Bosnia, Philipines [sic], and Chechnya") in which Muslims are fighting Christians. Abdur-Raheem commented about Muslims in Bosnia that "They had no guns. They had no training on how to fight and defend their own families. They were caught completely off guard by the Christians." (G Ex. 5F47). On January 9, 2000, he posted another message to the group under the subject "Re: Islam and Christianity are at War!", stating that "Yes brother the whole world is at war with Muslims, but Muslims are still sleeping." (G Ex. 5F48). Under the subject "The Russians Don't Stand a Chance", he stated that "Russian embassies all over the world are on high alert. The Russians realize that if you kill Muslims in one part of the world, other Muslims will kill you in another part of the world. May Allah accept that brother in Lebanon that raided the Russian Embassy as a shahid insha Allah. We need more of this in my opinion." (G Ex. 5F49). On January 15, 2000, Abdur-Raheem posted a message to the Chechnya's Friends Yahoo! Group under the subject "Re: SOON ENDING WAR: A dream from Virgin[ia]", commenting that "Many American Muslims want to go to Chechnya. Those who cannot go are sending money to charity organizations. The events in Chechnya are being discussed all over the Muslim world. Muslims, to include me, are very concerned about this war." (G Ex. 5F15).

Lastly, in spring 2003, Abdur-Raheem learned that Caliph Basha had told SA Wyman that paintball was jihad training and that the reason the paintball participants had acquired AK-47-style rifles was that they were the type of weapon used overseas.

Abdur-Raheem placed a call to Royer, which was intercepted. In that call Abdur-Raheem complained that Caliph Basha had "cracked" (G Ex. 1G3).

Based on this evidence of Abdur-Raheem's state of mind during the alleged conspiracy, we do not credit his testimony that paintball was strictly for recreation and physical fitness. Instead, we find that he knew that Royer, Al-Hamdi, and others were interested in getting military training to prepare for jihad actions.

*I. Evidence relating to Chapman*

Chapman presented documentary and testimonial evidence to establish his honorable career in the United States Marine Corps, his solid academic record, and his stable family life. He testified that he is a moderate Muslim who does not subscribe to terrorism. He consistently tried to downplay the significance of his involvement in paintball and his knowledge about the way many of the players viewed paintball as training for jihad. We found this testimony incredible in light of the consistent testimony of Gharbieh, Thompson, Surratt, Aatique, and Kwon about how intense Chapman was about the training drills and the need for discipline. When asked, for example, why latecomers were punished with physical marine-type discipline like push-ups, rather than being penalized by having to miss a game, he did not have a credible answer. Gharbieh testified that Chapman often sang nasheeds (war songs praising jihad which the Court heard on some of the violent videos in evidence) during paintball, and once said that anyone who is going to fight needs to know nasheeds. Kwon also testified that Chapman sang nasheeds. Chapman denied ever singing nasheeds. We find Gharbieh and Kwon credible on this point.

*817 Thompson testified that Chapman described paintball as a stepping stone to jihad training camps, and Surratt quoted Chapman as saying, "We're going to learn to fight." Chapman denied these statements, however, in light of the testimony and documentary evidence, we find Thompson and Surratt more credible.

Chapman's testimony about the LET camp was also incredible. Despite consistent testimony from the witnesses about how openly Royer and Al-Hamdi talked about their experiences at LET, Chapman claims he had no idea about LET's stated mission to fight India before he left for the camp. We do not accept his

statement that he knew nothing about the violent mission of this group, because the Taiba Bulletins were easily available on the Internet. The paintballers posted numerous links to jihad-oriented groups on their paintball Website and e-mailed each other such information. Chapman even sent from his work e-mail account to his home account an article titled, "Martyrs: The Building Blocks of Nations," which stated, "History does not write its lines except with blood" (G Ex. 4G3). Although Chapman may not have read the specific Taiba Bulletins entered into evidence, they are relevant as examples of the types of information publicly available. Various articles in mainstream newspapers, including the Washington Post, described LET's violent activities in 2000. It is simply implausible that a well-educated man, deeply involved in issues affecting Muslims, who described himself as a student of military history, and who associated with persons obsessed with jihad would not have been aware of the violent activities of LET.

Equally implausible is Chapman's explanation that he chose to go to LET in August 2001 for the scenery, outdoor activities, and low cost, without checking the LET Website before traveling halfway around the world. That statement is inherently incredible. Chapman has to deny looking at the website because had he admitted viewing it, he could not say he was unaware of LET's violent mission.

Further implausible testimony focused on what Chapman did after he returned from LET. Given his friendship with Khan and their both having been to LET in September 2001, it is inconceivable that on weekly hikes they took in the spring of 2002 they never discussed their experiences at LET. Similarly, it makes no sense that Chapman would not have compared notes with Al-Hamdi, who had married Chapman's sister-in-law, and was therefore part of Chapman's family. Lastly, if going to the LET camp was innocent, Chapman would have had no reason to lie to FBI agents in July 2003 when they asked him if he had ever received jihad training or been to LET when he was in Pakistan. Chapman answered no to both questions, and falsely told SA Christopher Mamula that he had gone to Islamabad to go hiking. Chapman explained at trial that the agents did not ask him about attending an LET camp, but asked about a terrorist camp, and Chapman did not consider the LET camp to be "terrorist." SA Mamula denied using the word "terrorist" during questioning.

However, even if that word was used, Chapman's perception that LET was not a terrorist group cannot be justified after December 2001, when it was officially declared a terrorist group, as discussed in an e-mail Royer sent to Chapman (G Ex. 4G4). Lastly, as discussed above, Chapman's continued contact with Singh a/k/a Abu Khalid and his willingness to help Singh obtain the video equipment for LET undercuts any claims of an innocent relationship with LET.

Because we find so many aspects of Chapman's testimony utterly implausible, we do not credit his innocent explanations *818 for a series of incriminating acts over the course of several years.

*J. Evidence relating to Khan*

Khan presented the testimony of his mother, Elisabeth Khan, and supporting documentation to establish that the purpose of his post-9/11 visit to Pakistan was to bring legal documents and make a court appearance regarding the probate of his late father's estate, which had been in litigation for years. Khan produced an e-mail message sent by Omar Khan dated September 11, 2001 requesting urgent documents. (Khan Ex. 109) We credit this evidence and find that one purpose of Khan's trip to Pakistan was to participate in legal proceedings. However, given the evidence that he also planned to attend, and indeed did attend, an LET camp during this trip, we do not find that the legal proceedings were his primary reason for traveling to Pakistan.

We accept Khan's argument that he was not a member of the paintball group. The evidence showed that he played paintball only once, and that was at a public course, not the private farm in Spotsylvania County, where the paintball activities in furtherance of the conspiracy occurred. We also find no evidence that Khan was a regular attendee at the Center. However, the evidence clearly establishes that Khan knew many of the conspirators and was close enough to Kwon and Al-Timimi to be welcome at the meeting on September 16, 2001. Moreover, the evidence of Khan's continued involvement with LET through his communications with Singh undercuts his argument that he was not a part of this conspiracy.

*III. Conclusions of Law*

*A. Conspiracy counts*

*1. Count 1*

[5] The essential elements of a conspiracy charged under 18 U.S.C. § 371 are 1) an agreement by two or more persons to perform some illegal act, 2) willing participation by the defendant, and 3) an overt act in furtherance of the conspiracy. *United States v. Meredith,* 824 F.2d 1418 (4th Cir.1987). As to Count 1, the general conspiracy alleged five objects as the underlying illegal acts: 1) violation of 18 U.S.C. § 960, the Neutrality Act; 2) violation of 18 U.S.C. § 2390, enlistment to serve against the United States, 3) violation of 18 U.S.C. § 924(b), receipt of firearms or ammunition with cause to believe that a felony will be committed therein; 4) violation of 18 U.S.C. § 924(g), interstate travel to acquire a firearm in furtherance of a Neutrality Act violation; 5) violation of 18 U.S.C. § 924(h), transfer of a firearm in furtherance of a Neutrality Act violation.

[6][7][8] For object one, the Neutrality Act violation, the essential elements are: 1) a military expedition organized in this country; 2) against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace; and 3) defendant provided means for the expedition in this district, with knowledge of its character. Based on our findings of fact above, we find that defendants Chapman and Abdur-Raheem participated in an agreement to organize, from this district, expeditions to join LET attacks on India, with whom the United States was then, and remains, at peace. Chapman and Abdur-Raheem furthered the conspiracy by training co-conspirators in combat skills through paintball games and the acquisition of weapons, with the knowledge that some co-conspirators had already traveled to Kashmir and fired on Indian positions, and with the expectation that other co-conspirators would do the same, using the training that Chapman and Abdur-Raheem provided. We find, however, that the government has *819 not established beyond a reasonable doubt that Khan entered into a conspiracy to violate the Neutrality Act. There is insufficient evidence that Khan himself planned to fight against India or Russia, countries with which the United States was then, and remains, at peace, or that he intended to aid others in doing so. Although Khan did travel to LET, the evidence shows that the trip

was for the purpose of receiving training to fight in Afghanistan, not on behalf of LET in its conflicts with India.

[9][10][11] For object two, enlistment to serve against the United States, the essential elements are: 1) enlistment or engagement within the United States or any place subject to the jurisdiction thereof, 2) with intent to serve in armed hostility against the United States. 18 U.S.C. § 2390. As we held in considering motions to dismiss the indictment, the only armed hostility alleged against the United States occurred in Afghanistan. The plain language of the statute "enlists or is engaged" is not limited to formal enrollment in an enemy military force, but can reach preparations within the United States for joining an enemy force overseas. As to Khan, we find that at the September 16, 2001 meeting at Kwon's house, Khan agreed with Royer, Kwon, Aatique, and Hasan to enlist or engage in armed hostility, and that by joining together within the United States to plan a trip abroad, the four conspirators enlisted to serve against the United States. Chapman was not present at the September 16 meeting, therefore he could not have joined that agreement. Although Abdur-Raheem was present, he did not join the plan and took no action to further it. Accordingly, we find that the government has not proved that these two defendants conspired to commit this offense. There is no evidence that the conspiracy in which these two defendants participated ever contemplated serving in armed hostility against the United States.

[12][13][14] For object three, the essential elements are: 1) shipping, transporting, or receiving a firearm or any ammunition; 2) in interstate or foreign commerce; 3) with intent to commit a predicate offense therewith, or with knowledge or reasonable cause to believe that a predicate offense would be committed therewith. 18 U.S.C. § 924(g). The predicate offenses designated in the government's bill of particulars include conspiracy to violate the Neutrality Act, conspiracy to provide material support to LET, conspiracy to provide services to the Taliban, and conspiracy under 18 U.S.C. § 959. For the reasons discussed in our findings of fact above, we believe that each element of this object has been proven beyond a reasonable doubt for Chapman and Abdur-Raheem. The evidence as to the defendants' possession and sale of numerous AK-47 firearms is uncontested. The witnesses' statements, including Caliph Basha's admission,

that these weapons were chosen because they were similar to the weapons used by mujaheddin overseas. Both Abdur-Raheem and Chapman helped co-conspirators obtain these weapons, and both signed false documents concerning their transfer and sale. The conspiracy included training with these weapons, and therefore furthered a Neutrality Act violation. Moreover, the weapons and ammunition traveled in interstate commerce. Because we do not find sufficient evidence that Khan received weapons to further any conspiracy, however, we do not find object three proven as to Khan.

[15][16] For objects four and five, an essential element of each count is a Neutrality Act violation. We have already found that Chapman and Abdur-Raheem conspired to violate the Neutrality Act, and that Khan did not. We now consider the other elements of each object as to Chapman and Abdur-Raheem. For object *820 four, the essential elements are: 1) traveling from any state or foreign country into any other state; 2) acquiring, transferring, or attempting to acquire or transfer, a firearm in such other State; 3) in furtherance of the Neutrality Act violation. In ruling on motions to dismiss the indictment, we held that *United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), required a nexus between the interstate travel and the acquisition of firearms, and that whether such a nexus existed was a question of fact. After reviewing all the evidence, we find that the necessary nexus has not been established. The evidence shows that the acquisition and transfer of firearms in furtherance of the conspiracy occurred within Virginia, and any interstate or international travel that Chapman and Abdur-Raheem undertook is not related to the transfer of firearms, either in time or in purpose.

[17][18] Object five is similar, but does not include the interstate travel element. The elements of object five are: 1) transferring a firearm; 2) knowing that such a firearm will be used to violate the Neutrality Act. The evidence shows that conspirators, including Chapman and Abdur-Raheem, transferred firearms among themselves, and the defendants knew that the firearms would be used to prepare for military expeditions overseas, in violation of the Neutrality Act. Therefore, the government has proved that Chapman and Abdur-Raheem conspired to commit the illegal act alleged in object five.

[19] Because the evidence presented proves that each defendant conspired to commit at least one object of the conspiracy, we find all defendants guilty of Count 1. In reaching this conclusion, we have considered whether Count 1 alleges a single broad conspiracy or multiple smaller conspiracies. Whether the government has proven a single conspiracy or multiple smaller ones is a question of fact. *See, e.g., United States v. Roberts,* 262 F.3d 286, 294 (4th Cir.2001), *cert. denied,* 535 U.S. 991, 122 S.Ct. 1548, 152 L.Ed.2d 473 (2002); *United States v. Harris,* 39 F.3d 1262, 1267 (4th Cir.1994). In this case, the overlapping relationships of the defendants, their shared interest in jihad, attendance at the LET camp, and being part of the trusted circle of Al-Timimi are sufficient evidence of membership in one overarching conspiracy with multiple goals.

*2. Counts 2, 3, and 4*

Respectively, Counts 2, 3, and 4 charge Khan with conspiracy to levy war against the United States, conspiracy to provide material support to al-Qaeda, and conspiracy to contribute services to the Taliban. The factual allegations supporting all three counts are that, after the attacks of September 11, 2001, Khan joined a conspiracy to fight on behalf of the Taliban in Afghanistan against an expected invasion by United States forces pursuing Al-Qaeda and Osama bin Laden.

[20][21][22] The elements of Count 2 are: 1) a conspiracy, 2) to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof. The elements of Count 3 are: 1) a conspiracy; 2) to knowingly provide material support or resources to a foreign terrorist organization; 3) within the United States or subject to the jurisdiction of the United States. 18 U.S.C. § 2339B. The elements of Count 4 are: 1) a conspiracy, 2) to willfully make or receive any contribution of funds, goods, or services, to or for the benefit of the Taliban. 50 U.S.C. § 1705(b); 31 C.F.R. § 545.201 *et seq.* *821 Contributing services to the Taliban has been prohibited since July 4, 1999, and Al-Qaeda has been designated a foreign terrorist organization since October 9, 1999. 64 Fed.Reg. 36,759; 64 Fed.Reg. 55,112.

[23] As we have found, the government's evidence establishes beyond a reasonable doubt that on September 16, 2001, Ali Al-Timimi urged the attendees at the meeting at Kwon's house to heed the call of Mullah Omar for all Muslims to help defend the Taliban. After the meeting, Khan heeded this advice and agreed with the three co-conspirators to travel to LET to obtain training with the object of fighting in Afghanistan. Fighting on behalf of the Taliban clearly constitutes providing services to that group. By September 16, 2001, it was clear that the fight for which Mullah Omar was bracing would be against United States forces, and that any fighting in defense of the Taliban would be against United States troops. The parties have stipulated to this fact (G Ex. 8-1), witnesses have testified that they were aware of it, and we take judicial notice of it. Although Khan never succeeded in reaching Afghanistan and therefore never actually contributed his services to the Taliban, the testimony of multiple witnesses was that after the September 16 meeting Khan intended to fight in Afghanistan, and he took concrete steps with co-conspirators to pursue that goal. This evidence establishes beyond a reasonable doubt that Khan is guilty of Counts 2 and 4.

[24] To be guilty of Count 3, Khan must have intended to provide material support to Al-Qaeda. The testimony of co-conspirators who attended the September 16 meeting was that Khan was heeding the call of Mullah Omar to fight on behalf of an Islamic nation established in Afghanistan. Although the parties have stipulated that the Taliban was protecting Al-Qaeda and bin Laden at that time (G Ex. 8-1), we find no direct evidence that Khan intended to provide material support to Al-Qaeda. Although the law prohibits "*any* contribution of funds, goods, and services, to or for the benefit of the Taliban," the law prohibiting aid to Al-Qaeda is narrower, prohibiting only "*material* support or resources" directly to that organization. 31 C.F.R. § 545.201(b) 18 U.S.C. § 2339B (emphasis added). "Material support or resources" is defined by statute as "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." 18 U.S.C. § 2339A. Although Khan's

fighting on behalf of the Al-Qaeda's protector, the Taliban, would certainly benefit Al-Qaeda, such assistance does not fit the statutory definition of "material support or resources." Accordingly, we find Khan not guilty of Count 3.

*3. Count 5*

[25] The elements of Count 5, conspiracy to provide material support to LET, are: 1) a conspiracy; 2) to provide material support or resources or conceal or disguise the nature, location, source, or ownership of material support or resources; 3) knowing or intending that they are to be used in preparation for, or in carrying out, a violation of 18 U.S.C. § 956. Title 18 U.S.C. § 956 prohibits 1) conspiring within the United States, with one or more other persons, regardless of where such other person or persons are located; 2) to commit at any place outside the United States an act that would constitute the offense of murder, kidnaping, or maiming if committed in the special maritime and territorial jurisdiction of the United States, or to damage or destroy specific property situated within a foreign country and belonging *822 to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, airport, airfield, or other public utility, public conveyance, or public structure, or any religious, educational, or cultural property so situated; 3) an overt act within the United States in furtherance of the conspiracy.

[26] We find ample evidence that LET was engaged in a conspiracy under 18 U.S.C. § 956 to commit crimes of violence and damage property in India, a foreign country with which the United States was at peace. Such evidence includes the Taiba bulletins published by LET taking credit for attacks on troops and civilian targets in India, as well as the news accounts of those attacks that several co-conspirators testified that they read. We also find ample evidence that persons within the United States participated in that conspiracy, including the testimony of several witnesses that both Royer and Al-Hamdi traveled to LET camps, returned to the United States, and encouraged other conspirators to attend LET training.

Moreover, as discussed in the findings of fact above, Khan and Chapman conspired to provide, and actually provided, model airplane video and navigation equipment to LET through Singh. Such equipment fits the definition of material support cited above

as both communications equipment and physical assets. The evidence also shows that the paintball leaders, including Chapman and Abdur-Raheem, conspired to provide material support to LET in the form of "personnel." Although defendants have repeatedly argued that attending an LET training camp does not constitute providing personnel to that organization under 18 U.S.C. § § 2339A, 2339B, we do not find that argument applicable, given the facts of this case. In *Humanitarian Law Project, et al. v. U.S. Department of Justice,* 352 F.3d 382, 403-405 (9th Cir.2003), the Ninth Circuit found the term "personnel," as used in 18 U.S.C. § 2339A, unconstitutionally vague because it could be construed to prohibit protected speech on behalf of a designated terrorist organization. To cure this objection, the Department of Justice has established a policy that a person may be prosecuted under 18 U.S.C. § 2339B if and only if that person has knowingly provided that organization with one or more individuals to work under the organization's direction or control. *See United States Attorneys' Manual* § 9-91.100. Because we read criminal statutes narrowly to avoid constitutional infirmities, *see Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932), we find that the statute as applied to this case does not implicate First Amendment concerns at all. The conspiracy alleged in Count 5 was not to provide "personnel" who would speak on behalf of LET, or provide moral support, or simply receive training, but to provide personnel who, after receiving training, would serve that organization as soldiers, recruiters, and procurers of supplies. Indeed, the evidence shows that the conspirators did much more than just receive training from LET-they returned to the United States, recruited co-conspirators, and purchased technology for LET to use in its attacks on India. Although there is no evidence that Abdur-Raheem participated in Chapman and Khan's technology transfers, his role in the paintball group with co-conspirators Chapman and Al-Hamdi, who did more than just train with LET, coupled with Abdur-Raheem's stated intent to help militant Muslims fighting against India, proves his participation in the conspiracy to provide material support to LET. Considering all the evidence, including Abdur-Raheem's and Chapman's lack of candor, we find beyond a reasonable doubt that Khan, Chapman, and Abdur-Raheem are guilty of Count 5.

*823 *4. Count 11*

[27] Count 11 charges Khan, Chapman, and Abdur-Raheem with conspiracy to possess and use firearms in connection with a crime of violence. The elements are: 1) a conspiracy, 2) to knowingly use, carry, possess, or discharge firearms, 3) in furtherance of a crime of violence. The predicate crimes of violence specified in the indictment include conspiracy to violate the Neutrality Act, conspiracy to provide material support to LET, conspiracy to supply services to the Taliban, conspiring to violate 18 U.S.C. § 959, conspiracy to levy war against the United States, conspiracy to provide material support to Al-Qaeda, and conspiracy to enlist and serve in armed hostility against the United States.

[28][29] There is overwhelming testimonial and documentary evidence that each defendant possessed, used, and discharged firearms, and we have already found each defendant guilty of at least one predicate crime. We find that each of these predicate crimes-conspiracies to violate the Neutrality Act, levy war against the United States, supply services to the Taliban, and provide material support to LET-are crimes of violence as defined by 18 U.S.C. § 924(c)(3). That subsection defines a crime of violence as a felony offense that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The predicate crimes clearly fit within this definition.

The only remaining issue is whether the defendants conspired to use and possess these weapons in furtherance of the predicate crimes. We find evidence that each of them did. The evidence shows that both Chapman and Abdur-Raheem facilitated the acquisition of weapons by co-conspirators, both by transferring weapons among the conspirators and attesting to paperwork that documented these transfers, sometimes falsely. The testimony of several witnesses was that the conspirators selected AK-47-style weapons to familiarize themselves with the types of weapons they would use if called upon to fight overseas. This evidence is sufficient to prove beyond a reasonable doubt that both Chapman and Abdur-Raheem intended that their possession and use of weapons, and the possession and use by co-conspirators, was in

furtherance of the conspiracies to violate the Neutrality Act and to provide material support to LET. For defendant Khan, we find that the agreement after the September 16 meeting to receive training at LET encompassed knowledge and intent that such training would include weapons training, and therefore Khan and his co-conspirators agreed to use weapons at the LET camp to further their conspiracy to levy war against United States forces on behalf of the Taliban. For these reasons, we find Khan, Chapman, and Abdur-Raheem guilty of Count 11.

*B. Neutrality Act Counts*

[30] Counts 9 and 10 charge Chapman and Khan, respectively, with violating the Neutrality Act, 18 U.S.C. § 960, by traveling to LET camps. The elements of these counts are: 1) a military expedition organized in this country; 2) against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace; 3) defendant provided means for the expedition in this district with knowledge of its character. The parties stipulated that the United States is now, and at all relevant times was, at peace with India (G Ex. 8-45).

*824 Based on our findings of fact, we find insufficient evidence that either Chapman or Khan organized their trip to the LET camp as an expedition against India. Although other members of LET certainly conducted expeditions against India, and although Royer told co-conspirators that he had participated in such attacks, we do not find that Khan and Chapman participated in any operations against India, or that their intent in traveling to the LET camp was directed at waging war against India. Chapman's attendance at the camps suffices to place him in a conspiracy to violate the Neutrality Act and Khan's attendance places him in a conspiracy to supply services to the Taliban. However, the government has failed to prove beyond a reasonable doubt the second element of the substantive Neutrality Act violation as to Khan and Chapman, that is, that their expeditions from the United States to the LET camp were military expeditions against India. Therefore, we find Chapman not guilty of Count 9 and Khan not guilty of Count 10.

*C. Firearms counts*

*1. Counts 12-14 (Receiving ammunition)*

[31][32] Counts 12-14 charge Abdur-Raheem with receiving ammunition in interstate commerce with cause to believe that a felony is to be committed therewith. Each count relates to a separate shipment of ammunition ordered by Abdur-Raheem. The elements of the offense are: 1) defendant shipped, transported, or received ammunition; 2) in interstate or foreign commerce; 3) with intent to commit therewith a felony, or with knowledge or reasonable cause to believe that a felony is to be committed therewith. The predicate crimes alleged include the conspiracies charged in the indictment. The evidence clearly establishes that Abdur-Raheem received ammunition in interstate commerce, and, as discussed above, we have found Abdur-Raheem guilty of three predicate felonies. The only remaining issue is whether Abdur-Raheem had the necessary intent, i.e. whether there is a sufficient link between the receipt of ammunition and the predicate felonies.

We do not find sufficient evidence of such a link. The evidence shows that Abdur-Raheem acquired a rifle before the beginning of the conspiracy, and used this rifle for target practice, often with co-defendant Caliph Basha, against whom all charges were dismissed. The evidence also shows that the ammunition shipments charged in Counts 13 and 14 were actually sent to Caliph Basha, and were suitable for use in Caliph Basha's rifle, but not the model of rifle owned by Abdur-Raheem. The evidence also shows that some of this ammunition was stolen from Caliph Basha, and other ammunition was recovered from the home of Abdur-Raheem in March 2003. Of the ammunition that was expended, there is no evidence that the ammunition was used for anything other than Abdur-Raheem's and Caliph Basha's target shooting at the firing range, or that the ammunition was used by any co-conspirators. Based on this evidence, the government has not proved beyond a reasonable doubt that Abdur-Raheem intended to use the ammunition in relation to the predicate conspiracy felonies, and therefore we find Abdur-Raheem not guilty of Counts 12-14.

*2. Counts 20, 21, 31, and 32 (Possession of firearms)*

[33][34] Counts 20, 21, 31, and 32 charge defendants with possession of firearms in furtherance of a crime of violence, in

violation of 18 U.S.C. § 924(c). Count 20 charges Chapman with possession of a Saiga .308 rifle in Fairfax, VA on December 18, 2000. Count 21 charges Chapman *825 with possession of an AK-47 rifle in Falls Church, VA in June 2001. Count 31 charges Abdur-Raheem with possession of an AK-47 rifle at his home in Falls Church, VA on April 1, 2003. Count 32 charges Khan with possession of an AK-47 rifle at his home in Gaithersburg, MD on May 8, 2003. The elements of a § 924(c) offense are: 1) knowing possession; 2) in furtherance of a crime of violence for which defendant may be prosecuted in a court of the United States. The predicate crimes of violence alleged are the conspiracies in the indictment, of which we have already found each defendant guilty. The evidence of possession by each defendant on the date alleged is clear. The remaining question is whether such possession was in furtherance of the predicate conspiracies.

In *Bailey v. United States,* 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), the Supreme Court held that 18 U.S.C. § 924(c), which at that time only criminalized using and carrying a firearm "during and in relation to" a crime of violence, did not reach mere contemporaneous possession of the weapon, but required some active employment of the firearm. In response, Congress amended 18 U.S.C. § 924(c) to criminalize possession "in furtherance of" a crime of violence, while retaining the prohibition on using and carrying firearms "during and in relation to" crimes of violence. Congress explained that "in furtherance of" was a higher standard than "during and in relation to," and that to convict under the possession prong rather than the using and carrying prong:

> The government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense. The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence. Rather, the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity.

H.R.Rep. No. 105-344. *See United States v. Lomax,* 293 F.3d 701, 704 (4th Cir.2002); *United States v. Mackey,* 265 F.3d 457, 461 (6th Cir.2001).

[35] In interpreting this section, courts have developed a non-exclusive list of factors to be considered in determining whether a sufficient nexus exists between possession of the weapon and the predicate offense. These factors include the type of weapon, the legality of its possession, the type of criminal activity conducted, and the time and circumstances under which the firearm was found. *See Mackey,* 265 F.3d at 462; *United States v. Wahl,* 290 F.3d 370, 376 (D.C.Cir.2002).

Count 21 charges Chapman with possession in December 2000, on the date he sold the Saiga .308 rifle to co-conspirator Ibrahim Al-Hamdi. As we discussed in our findings of fact above, Hamdi had traveled to LET in the fall of 2000, and by December 2000 we find that Chapman knew Al-Hamdi had taken this trip. During 2000 and 2001, both Chapman and Al-Hamdi were leaders in the paintball games, and the evidence shows that part of the conspiracy was to familiarize the conspirators with various weapons. Because we find that Chapman's transfer of the weapon to Al-Hamdi furthered the conspiracy to violate the Neutrality Act, by extension Chapman's possession of the weapon on that date furthered the conspiracy. Accordingly, we find Chapman guilty of Count 20.

[36] Count 21 charges Chapman with possession in June 2001, when he sold two AK-47 rifles before leaving for his trip to Pakistan. The evidence regarding these transactions is somewhat unclear, but it appears that in June 2001 Chapman sold one rifle to Ahmed Abu Ali and the other *826 to Nader Khallifah, Nabil Gharbieh's cousin. One of these rifles was subsequently transferred to Caliph Basha. Because neither of the purchasers in June 2001 was a member of any conspiracy alleged in the indictment, we do not find a sufficient nexus between Chapman's possession of these weapons when he sold them in June 2001 and any predicate offense. Accordingly, we find Chapman not guilty of Count 21.

[37] Count 31 charges Abdur-Raheem with possession of an AK-47 rifle when he was interviewed by FBI agents at his home in April 2003. He voluntarily surrendered the rifle to the agents at that time. The evidence shows that the rifle was unloaded, in a case, and in a closet of the home, and that it was legally owned. There is no evidence that Abdur-Raheem had fired the weapon after September 11, 2001. Evidence of phone calls among Abdur-

Raheem, Royer, and Al-Timimi in the spring of 2003 shows that the conspiracy was still continuing at that time, and that Abdur-Raheem had not withdrawn. However, applying the factors that distinguish possession in furtherance of a crime from legal possession of a lawful weapon, we find that by 2003 the connections between the possession and the predicate conspiracy crimes had become too attenuated to establish the "furtherance" element beyond a reasonable doubt. For this reason, we find Abdur-Raheem not guilty of Count 31.

[38] Count 32 against Khan suffers from the same deficiency. Khan is charged with possession of an AK-47 rifle that FBI agents seized when executing a search warrant at his home in May 2003. The weapon was found unloaded in a basement closet and was legally owned. The only relevant difference from the Abdur-Raheem possession in Count 31 was that the weapon was seized pursuant to a warrant rather than voluntarily surrendered, but we do not consider that distinction material, because there is no evidence that Khan was given an opportunity to surrender the weapon voluntarily. For the same reasons discussed as to Count 31, we find that Khan's possession in March 2003 was not in furtherance of any predicate crime, and find Khan not guilty of Count 32.

*3. Counts 22 and 24-27 (Use and discharge of firearms)*

[39] Counts 22 and 24-27 charge Chapman and Khan, respectively, with using and discharging weapons during their attendance at LET camps in Pakistan in 2001. The elements of this offense are: 1) knowing use and discharge; 2) during and in relation to a crime of violence. Among the predicate crimes of violence alleged are the conspiracies charged in the indictment. We have already found both Khan and Chapman guilty of conspiracies that included their travel to the LET camp. The remaining issues are whether the defendants did in fact use and discharge weapons during their trips, and whether such use and discharge was during and in relation to the predicate conspiracies.

[40] Count 22 charges Chapman with firing an AK-47, a machine gun, and a rocket-propelled grenade in September 2001. There was no evidence presented from anyone who was present at the camp and witnessed Chapman fire these weapons. The only evidence comes from Chapman himself, who testified that he fired an AK-47, but not a machine gun or a rocket-propelled grenade.

We find, therefore, that Chapman fired an AK-47 at the LET camp, but none of the other weapons charged. We further find that firing weapons at the camp was during and in relation to the conspiracies to violate the Neutrality Act and provide material support to LET. Firing weapons while at the camp was essential to the conspiracies, as this opportunity provided the conspirators *827 with an incentive to attend and trained them in skills that they could use in future jihad combat. For these reasons, we find that the elements of Count 22 have been satisfied beyond a reasonable doubt, and find Chapman guilty of discharging an AK-47 rifle.

[41] Khan is charged in four separate counts with using and discharging an AK-47 rifle (Count 24), a 12 mm anti-aircraft gun (Count 25), a machine gun (Count 26), and a rocket-propelled grenade (Count 27), all during his trip to the LET camp in September and October 2001. As discussed in our findings of fact above, we find credible and consistent the testimony of co-conspirators Hasan and Kwon, who participated in the weapons training with Khan and testified that they and Khan each fired an AK-47, an anti-aircraft gun, and a rocket-propelled grenade. For the same reasons discussed above as to Chapman, we find that firing these weapons at the LET camp was during and in relation to the predicate conspiracy crimes of violence. Accordingly, we find Khan guilty of Count 32, and that he discharged an AK-47 rifle, an anti-aircraft gun, and a rocket-propelled grenade.

*IV. Conclusion*

For the above stated reasons, we find defendant Khan guilty of Counts 1, 2, 4, 5, 11, 24, 25, and 27; defendant Chapman guilty of Counts 1, 5, 11, 20, and 22, and defendant Abdur-Raheem guilty of Counts 1, 5, and 11; and find the defendants not guilty of the remaining counts. Separate judgment orders reflecting the Court's judgment as to each defendant will be issued with this Memorandum Opinion.

United States Court of Appeals, Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Masoud Ahmad KHAN, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Seifullah Chapman, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Hammad Abdur-Raheem, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Masoud Ahmad Khan, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Seifullah Chapman, Defendant-Appellant.
United States of America, Plaintiff-Appellant,
v.
Hammad Abdur-Raheem, Defendant-Appellee.
Nos. 04-4519 No. 04-4520 No. 04-4521 No. 05-4811 No. 05-4818 No. 05-4893.
Filed: September 29, 2006

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On Petition for Rehearing En Banc

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The defendants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Widener, Judge Duncan, and Judge Goodwin.

For the Court,

/s/ Patricia S. Connor

CLERK

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

* * *

The Sixth Amendment of the Constitution of the United States provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *."

* * *

Title 18, U.S.C. § 924(c)(1) provides:

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to a crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment not less than 10 years; or

(ii) is a machine gun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years,; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Not withstanding any other provision pf law __

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

* * *

Federal Rule of Criminal Procedure 23(a) provides, in pertinent part:

(a) **Jury Trial**. If the defendant is entitled to a jury trial, the trial must be by jury unless:

(1) the defendant waives a jury trial in writing;

(2) the government consents; and

(3) the court approves

* * *

Federal Rule of Criminal Procedure 11(b)(1) and (b)(2) provide, in pertinent part:

(b)(1) * * * the court must address the defendant personally in open court * * *.

(b)(2) * * * Before accepting a plea of guilty * * * the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promise * * *.

* * *

Title 18, U.S.C. § 960 provides:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.

United States District Court
For the Eastern District of Virginia
Alexandria Division

| | | |
|---|---|---|
| United States of America | . | Criminal No. 1:03cr296 |
| | . | |
| Vs. | . | January 20, 2004 |
| | . | 10:25 a.m. |
| Caliph Basha Ibn Abdur-Raheem, | . | |
| | . | |
| Defendant. | . | |

. . . . . .

Transcript of Hearing
Before the Honorable Leonie M. Brinkema
United States District Judge

Appearances:

| | |
|---|---|
| For the Government: | Gordon D. Kromberg, AUSA<br>David H. Laufman, AUSA |
| For the Defendant: | Christopher B. Amolsch, Esq. |

* * *

[14] THE COURT: Mr. Abdur-Raheem, come up to the lectern for just a second. I want to make sure you know clearly you have an absolute right to a trial by jury, and I have great confidence that our juries can be impartial. They're very smart. The average education levels for our juries is really high * * * But I want to make sure that you're not giving up your right to a trial by jury just because the Court has ruled against you on this motion.

* * *

[15] THE COURT: All right. And you haven't been pressured by any of the codefendants or anybody else to make this decision?

United States District Court
For the Eastern District of Virginia
Alexandria Division

| | | |
|---|---|---|
| United States of America | . | Criminal No. 1:03cr296 |
| | . | |
| Vs. | . | January 16, 2004 |
| | . | 2:30 p.m. |
| Seifullah Chapman | . | |
| | . | |
| Defendant. | . | |

. . . . . .

Transcript of Suppression Hearing
Before the Honorable Leonie M. Brinkema
United States District Judge

Appearances:

For the Government: Gordon D. Kromberg, AUSA
David H. Laufman, AUSA
John T. Gibbs, Esq.

For the Defendant: John K. Zwerling, Esq.
Lisa Bondareff Kemler, Esq.

* * *

[4] THE COURT: * * * I don't think it's appropriate to keep coming to court every week with motions. I mean, you're here today. I've had a chance to read the motion, and although I understand the concern that you've got about joinder, I've ruled on that issue once before, and I'm not going to reverse myself and hold that Mr. Chapman is entitled to a separate trial.

FILED
APR 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-1116 and 06-9398

# In the Supreme Court of the United States

MASOUD AHMAD KHAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

SEIFULLAH CHAPMAN AND HAMMAD ABDUR-RAHEEM, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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*Solicitor General*
*Counsel of Record*
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*Assistant Attorney General*
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*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether petitioners were properly sentenced to consecutive terms of imprisonment for multiple offenses of using, carrying, possessing, and discharging firearms, in violation of 18 U.S.C. 924(c).

2. Whether petitioners knowingly, intelligently, and voluntarily waived their right to a jury trial.

3. Whether petitioners were properly denied discovery in support of a claim of selective prosecution.

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# In the Supreme Court of the United States

No. 06-1116

MASOUD AHMAD KHAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

No. 06-9398

SEIFULLAH CHAPMAN AND HAMMAD ABDUR-RAHEEM, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 461 F.3d 477.[1] The opinion of the district court (Pet. App. 35a-83a) is reported at 309 F. Supp. 2d 789.

[1] Unless otherwise noted, all references to "Pet. App." are to the Appendix filed in No. 06-1116.

## JURISDICTION

The judgment of the court of appeals was entered on September 1, 2006. A petition for rehearing was denied on September 29, 2006 (Pet. App. 84a-85a). The petitions for a writ of certiorari were filed on December 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner Khan was convicted of conspiring to commit offenses against the United States, including enlisting with intent to serve in armed hostility against the United States, in violation of 18 U.S.C. 371 (Count 1); conspiracy to levy war against the United States, in violation of 18 U.S.C. 2384 (Count 2); conspiracy to contribute services to the Taliban, in violation of 50 U.S.C. 1705 (Count 4); conspiracy to contribute material support to terrorists, in violation of 18 U.S.C. 2339A (Supp. II 2002) (Count 5); conspiracy to possess and use a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(*o*) (Count 11); and three counts of using, carrying, possessing, and discharging firearms during and in relation to and in furtherance of crimes of violence, in violation of 18 U.S.C. 924(c) (Counts 24, 25, 27). Pet. App. 35a-36a, 70a. After an initial remand for resentencing of petitioners in light of *United States* v. *Booker*, 543 U.S. 220 (2005), see Pet. App. 7a, Khan was sentenced to 60 months of imprisonment on Count 1, a concurrent 120-month sentence on Count 2, a concurrent 120-month sentence on Count 4, a concurrent 120-month sentence on Count 5, a concurrent 120-month sentence on Count 11, a consecutive 120-month sentence on Count 24, a

consecutive 300-month sentence on Count 25, and a consecutive sentence of life imprisonment on Count 27. C.A. App. 3451-3453.

Petitioner Chapman was convicted of conspiring to commit offenses against the United States, including taking part in a military expedition against a foreign state with whom the United States was at peace, in violation of 18 U.S.C. 371 (Count 1); conspiracy to contribute material support to terrorists, in violation of 18 U.S.C. 2339A (Supp. II 2002) (Count 5); conspiracy to possess and use a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(*o*) (Count 11); and two counts of using, carrying, possessing, and discharging firearms during and in relation to, and in furtherance of crimes of violence, in violation of 18 U.S.C. 924(c) (Counts 20, 22). Pet. App. 35a-36a, 70a. He was sentenced to 60 months of imprisonment on Count 1, a concurrent 120-month sentence on Count 5, a concurrent 120-month sentence on Count 11, a consecutive 300-month sentence on Count 20, and a consecutive 360-month sentence on Count 22. C.A. App. 3459-3460.

Petitioner Hammad Abdur-Raheem (Hammad) was convicted of conspiring to commit offenses against the United States, including taking part in a military expedition against a foreign state with whom the United States was at peace, in violation of 18 U.S.C. 371 (Count 1); conspiracy to contribute material support to terrorists, in violation of 18 U.S.C. 2339A (Supp. II 2002) (Count 5); and conspiracy to possess and use a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(*o*) (Count 11). Pet. App. 35a-36a, 70a. He was sentenced to 52 months of imprisonment on Count 1, a concurrent 52-month sentence on Count 5, and a concurrent 52-month sentence on Count 11. C.A. App. 3465-3466.

The court of appeals affirmed petitioners' convictions and the sentences of Khan and Chapman. On the government's cross-appeal, the court of appeals reversed and remanded Hammad's sentence as an unreasonable variance from the advisory range under the Sentencing Guidelines. Pet. App. 1a-34a.

1. a. Between 1999 and September 11, 2001, petitioners, and their associates, including Muhammed Aatique, Randall Todd Royer, Young Ki Kwon, Khwaja Mahmood Hasan and Caliph Basha Ibn Absur-Raheem (Caliph), attended Dar al Arqam Islamic Center in Falls Church, Virginia where Ali Timimi, a religious leader, preached the necessity of engaging in a violent holy war, or jihad, against the enemies of Islam. Several of the attendees, including petitioners Chapman and Hammad, organized a group to prepare to engage in jihad by simulating combat through paintball exercises and practices at firing ranges. By the early summer of 2000, the group met every other weekend. Chapman, Hammad, and others brought AK 47-style rifles to paintball training and practiced marksmanship. Pet. App. 2a-3a. Because Chapman and Hammad had military experience, they also assisted in leading the paintball exercises and conducted training that was "out-of-character for a recreational paint-ball pastime." *Id.* at 3a.

During this period, members of the group had ties to Lashkar-e-Taiba (LET), the military arm of a Pakistani organization which, between 1999 and 2003, focused on expelling India from Kashmir and advertised free jihad training in Pakistan. Pet. App. 3a, 52a. Between April and September 2000, Royer, followed by Hamdi, traveled to Pakistan, where they received military training at LET camps and acknowledged participation in hostilities. *Id.* at 53a-54a. Upon their return, they rejoined

the paintball group and discussed their jihad experiences with LET with the other paintball participants. *Id.* at 3a, 55a. In the summer of 2001, Chapman, who sought more realistic combat experience, traveled to the LET camps in Pakistan where he participated in training that included firing various rifles and handguns, including an automatic weapon. *Id.* at 3a.

On September 16, 2001, Timimi met with a small group, including petitioners Khan and Hammad, and stated that the September 11, 2001, terrorist attacks against the United States were justified. He exhorted those present to defend the Taliban against United States armed forces who were expected to invade Afghanistan in response to the attack. Several attendees, including Khan, expressed their intent to train at LET camps as preparation for serving with the Taliban in Afghanistan. Pet. App. 4a, 56a-57a.

Following the September 16, 2001, meeting with Timimi, Khan "exhorted the others to go with him to Afghanistan because 'the cowards and the weak hearted are the first to run away.'" Pet. App. 8a (quoting C.A. App. 1013). Petitioner Khan, along with Kwon, Aatique and Hasan, agreed to go to Pakistan for jihad training with the intent to fight in Afghanistan upon its completion. Pet. App. 8a-9a, 57a. Kwon, Hasan, and Khan agreed that Khan would be their "emir" or leader. *Id.* at 4a, 9a.

Khan, Hasan, and Kwon spent about six weeks in the LET camps during which they received training in commando tactics, reconnaissance, hand-to-hand combat and survival. They also received instruction on and used various firearms, including the AK-47 automatic rifle, an anti-aircraft gun, a rocket-propelled grenade, and mines. Pet. App. 4a, 57a-59a.

In November 2001, while at an LET camp, Khan, Hassan, and Kwon learned through radio reports that American forces were defeating the Taliban in Afghanistan and that, because Pakistan had closed the border with Afghanistan, LET would not facilitate their travel there. Moreover, Pakistani authorities were aggressively removing foreigners from their camps. As a result, the three men left the camps without ever reaching Afghanistan. Pet. App. 5a, 59a.

b. In February 2003, law enforcement authorities executed a search warrant on Timimi's residence. On March 24, 2003, the Federal Bureau of Investigation approached Caliph, one of the participants in the paintball training. Caliph informed them that the training was intended as preparation for jihad and that the trainees had purchased AK-47-style rifles because they were the type of rifles used overseas. When Hammad learned of Caliph's admissions, he called a colleague "with the 'bad news' that Caliph had 'cracked.'" Pet. App. 5a. In June 2003, as a result of the investigation, petitioners, along with eight co-defendants, including Caliph, Kwon, Aatique, Hasan, and Royer, were indicted for various offenses, including conspiracy to engage in military expeditions against the United States and India. Four of the defendants, including Kwon, Aatique, and Hasan, entered pleas of guilty and agreed to cooperate with the government. *Ibid.* In September 2003, the government charged the remaining defendants in a 32-count superseding indictment which alleged that petitioner Khan, but not petitioners Chapman and Hammad, conspired to levy war against the United States, to provide material

support to Al-Qaeda, and to contribute services to the Taliban. *Id.* at 5a & n.3.[2]

2. a. Before trial, Chapman, Hammad, and two co-defendants moved to sever their trial from that of Kahn and Royer on the ground that Khan and Royer were the only defendants charged with conspiring to levy war against the United States and to support Al-Qaeda and the Taliban. C.A. App. 186. The district court denied the motion. *Id.* at 189.

Chapman later renewed the severance motion in writing and, in the alternative, requested a bench trial. C.A. App. 218-221. The motion observed that "[a] bench trial would likely result in a much shorter trial, and most certainly, would afford the accused with the opportunity to receive a fair trial." *Id.* at 220-221; Pet. App. 6a. At a hearing with petitioner Chapman present, the district court indicated it would deny the renewed severance motion. C.A. App. 224-226. The court noted Chapman's "alternative * * * motion to waive jury," and requested the government's position: "The government has a right to trial by jury as well as the defendant, and so both sides have to agree to a waiver." *Id.* at 225.

Hammad, through counsel, filed a written motion to join Chapman's renewed motion for severance or, in the alternative, to waive a jury (Docket No. 387; C.A. App. 302; Pet. App. 6a), and Khan, through counsel, filed a written motion to join Chapman's motion to waive a jury (C.A. App. 281). The government filed a written concur-

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[2] In addition to petitioners, the superseding indictment named as defendants Royer, Ibrahim Ahmed Al-Hamdi, Caliph, and Sabri Benkhala. Royer and Hamdi entered pleas of guilty. Benkhala was tried separately and acquitted. Pet. App. 5a-6a. Caliph, who was tried with petitioners, was granted an acquittal under Federal Rule of Criminal Procedure 29. Pet. App. 6a.

rence to a bench trial. *Id.* at 300. In a written order, the district court denied the renewed severance motions but granted the motions for a bench trial. Pet. App. 6a; C.A. App. 302-303.[3]

b. Petitioners filed a pretrial motion alleging selective prosecution and seeking dismissal of the indictment or, in the alternative, discovery to support such a claim. They alleged that they were targeted for prosecution because of their Muslim religion and that, before their indictment, the government had not undertaken any prosecutions under the Neutrality Act, 18 U.S.C. 960, in the Eastern District of Virginia in over 100 years. C.A. App. 189-190. The district court denied the motion, stating that petitioners "have not identified any similarly situated persons not prosecuted" and that the inclusion of information about Islam in the indictment was "relevant to the offenses charged" and "its inclusion d[id] not show animus by the Government." *Id.* at 190. At the close of trial, petitioners renewed the motion, alleging that the Cambodian Freedom Fighters (CFF), led by one Yasith Chhun, and the Irish Republican Army (IRA) engaged in similar conduct in an open and notorious manner yet were not prosecuted. *Id.* at 3234-3240. The district court again denied the motion, reasoning that the government had adequately demonstrated that LET had links to anti-American activity whereas there was no similar evidence with respect to the other identified groups. *Id.* at 3385-3386.

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[3] Caliph separately moved for a severance. When his motion was denied at a hearing at which he was the only defendant present, Caliph orally moved, through counsel, to join Chapman's motion for a bench trial. Pet. App. 6a n.4; C.A. App. 295-296. At that time, the district court questioned Caliph directly about his knowledge of his right to a jury trial. Pet. App. 89a-90a; C.A. App. 296-297.

c. Various combinations of petitioners and their co-defendants were charged in 16 separate counts alleging the use, discharge, or possession of a firearm during and in relation to or in furtherance of federal crimes of violence, in violation of 18 U.S.C. 924(c)(1)(B)(ii). The separate counts were preceded by an introductory paragraph incorporating by reference the general allegations and overt acts in Count 1 of the indictment, which included reference to five separate conspiracy counts. The Section 924(c) counts then listed the identities of the particular petitioners or co-defendants charged with the violation, the date and location of the offense, the type of firearm involved, and an allegation whether the firearm was used, possessed, or discharged. C.A. App. 151-152.

At the conclusion of the trial, the district court made particularized findings concerning each of the counts. It linked Chapman's possession of a Saiga .308 rifle charged in Count 20 to the conspiracy to violate the Neutrality Act alleged in Count 1 and therefore convicted him on that firearms count. Pet. App. 81a. It likewise convicted him of firing an AK-47, as alleged in Count 22, observing that such conduct, which occurred at an LET camp, was during and in relation to both the conspiracy to violate the Neutrality Act and the conspiracy to provide material support to LET. *Id.* at 82a-83a. The court found that, at an LET camp, petitioner Khan fired an AK-47 rifle, as alleged in Count 24; an anti-aircraft gun, as alleged in Count 25; and a rocket-propelled grenade, as alleged in Count 27. It further found that "firing these weapons at the LET camp was during and in relation to the predicate conspiracy crimes of violence." *Id.* at 83a. At sentencing, the district court imposed sentences on these counts that, as required by Section 924(c), were consecutive to both the sentences

on the underlying crimes of violence, *i.e.*, the conspiracy counts, and to the sentences on the other Section 924(c) counts. C.A. App. 3451-3453, 3459-3460.

2. The court of appeals affirmed. Pet. App. 1a-34a.[4] It rejected petitioners' claim that their jury-trial waivers were invalid because the district court failed to obtain written waivers from petitioners, as opposed to their counsel, and did not conduct a colloquy directly with petitioners. Although the court observed that "it would be 'better practice' for a district judge to interrogate a defendant who claims through counsel that he wants to waive his jury trial right," the court concluded that neither Rule 23(a) of the Federal Rules of Criminal Procedure nor the Constitution requires it. *Id.* at 15a (quoting *United States* v. *Hunt*, 413 F.2d 983, 984 (4th Cir. 1969) (per curiam)). It found that the record here supported the conclusion that the waivers were voluntary, knowing, and intelligent "even though signed by counsel and in the absence of a colloquy." *Id.* at 16a. The court concluded that the motions for waiver were made as an alternative to the motions for severance "as a calculated part of [petitioners'] trial strategy to prevent 'inflammatory and prejudicial evidence' from biasing a jury." *Ibid.* (quoting C.A. App. 220). The court likewise rejected the arguments of Chapman and Hammad that their waivers were not knowing and voluntary because, by denying their motions to sever, the district court forced them to relinquish their right to a jury trial. The court reasoned that the fact that petitioners "would have preferred severed jury trials [did]

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[4] On the government's appeal, the court reversed Hammad's sentence and remanded for resentencing. Pet. App. 26a-30a.

not make their choice of a non-severed bench trial" unknowing or involuntary. *Ibid.*

b. The court rejected Khan and Chapman's argument that they should not have received separate, consecutive sentences on their 18 U.S.C. 924(c) offenses because the underlying predicate offenses for those convictions all related to the same criminal "episode." The court reasoned that convictions for separate crimes of violence can lead to multiple consecutive sentences under Section 924(c) as long as the predicate offenses are distinct under the Double Jeopardy Clause. Pet. App. 17a-19a. The court explained that, if the predicate offenses are not identical under *Blockburger* v. *United States*, 284 U.S. 299 (1932), consecutive sentences under Section 924(c) are permissible. Pet. App. 18a-19a.

The court noted that Khan was convicted of "*four* predicate crimes of violence," Pet. App. 18a, and that "each may support a consecutive § 924(c) sentence without requiring the court first to enumerate 'uses' of firearms." *Id.* at 19a. In the court's view, it was inconsequential that the Section 924(c) counts listed all the predicate offenses as part of the same general factual allegation. It reasoned that "there is no housekeeping requirement" under either Section 924(c) obliging the government or the district court "to align the use of a particular firearm with a particular predicate offense." *Id.* at 20a.

c. The court of appeals rejected petitioners' claim that they had been improperly denied discovery on their selective prosecution claim. The court reasoned that, to obtain discovery on such a claim, a defendant must make "a credible showing of different treatment of similarly situated persons." Pet. App. 25a (quoting *United States* v. *Armstrong*, 517 U.S. 456, 470 (1996)). The court con-

cluded that petitioners' claim that the only distinguishing factor between themselves and the other groups they identified as similarly situated is that they are "Muslim in a post-9/11 world," *id.* at 26a (quoting Pet'rs C.A. Br. 88), disregarded "the very obvious fact that [petitioners] were accused of supporting LET, a terrorist group that supported the Taliban and Al-Qaeda, which were in direct conflict with the United States." *Ibid.* The court observed that the Executive has "the right to focus its prosecutorial energies on alleged terrorist[] groups that present the most direct threat to the United States and its interests." *Ibid.* Accordingly, the court held that the district court did not err in denying discovery on petitioners' selective prosecution claims. *Ibid.*[5]

d. Judge Goodwin dissented in part, stating that he would merge Khan's three Section 924(c) convictions into one 120-month sentence. Pet. App. 30a-34a. In his view, under the governing law of the Fourth Circuit, each use of a firearm during and in relation to a qualifying conspiracy offense constitutes a basis for a separate prosecution and, upon conviction, a consecutive sentence. Judge Goodwin concluded, however, that only

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[5] The court of appeals also considered and rejected petitioners' claims that they were entitled to reversal of their convictions because the evidence was insufficient to support them (Pet. App. 8a-13a); that the severance motions of Chapman and Hammad were improperly denied (*id.* at 13a-14a); that Counts 5 and 11 were invalid as conspiracies to conspire (*id.* at 16a-17a); that the Section 924(c) sentences were unconstitutional (*id.* at 20a-21a); that the district court improperly admitted co-defendant Caliph's out-of-court statements for use against them (*id.* at 22a-23a) and that it improperly admitted Chapman's unwarned statements to law enforcement authorities against him for the purpose of impeachment (*id.* at 23a-25a). Petitioners do not press these claims in this Court.

uses of a firearm that are distinct from one another justify multiple sentences. *Id.* at 31a-34a. Thus, where the "uses" of "different firearms relate to the same objective, have the same effect on the predicate crime, and are used or carried proximately in time," he would impose only one Section 924(c) sentence. *Id.* at 32a. In his view, Khan had only one objective when firing the weapons that supported his three Section 924(c) convictions—enhancement of his training in preparation for movement to Afghanistan. In addition, he found no evidence establishing the objectives, effects, and proximity of each such use of a firearm. Accordingly, Judge Goodwin would not have imposed separate sentences. *Id.* at 34a.

## ARGUMENT

1. Petitioners Khan and Chapman contend (06-1116 Pet. 7-15; 06-9398 Pet. 7-14) that the district court erred in imposing consecutive terms of imprisonment for their multiple violations of 18 U.S.C. 924(c) because (in their view) the predicate offenses resulted from a single criminal episode involving a single objective. The court of appeals correctly rejected that claim, and no further review is warranted.

a. Section 924(c) prohibits using or carrying a firearm during and in relation to a federal crime of violence or drug trafficking crime, or possessing a firearm in furtherance of any such crime. It further provides:

> no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. 924(c)(1)(D)(ii).

The majority of the courts of appeals that have addressed the question have held that each underlying predicate crime of violence or drug trafficking crime can support a separate Section 924(c) conviction and consecutive sentence. See *United States* v. *Morris*, 247 F.3d 1080, 1084 (10th Cir. 2001); *United States* v. *Casiano*, 113 F.3d 420, 425-426 (3d Cir.), cert. denied, 522 U.S. 887 (1997); *United States* v. *Anderson*, 59 F.3d 1323, 1334 (D.C. Cir.) (en banc), cert. denied, 516 U.S. 999 (1995); *United States* v. *Cappas*, 29 F.3d 1187, 1189 (7th Cir. 1994); *United States* v. *Taylor*, 13 F.3d 986, 992-994 (6th Cir. 1994); *United States* v. *Lindsay*, 985 F.2d 666, 674-675 (2d Cir.), cert. denied, 510 U.S. 882 (1993); *United States* v. *Hamilton*, 953 F.2d 1344, 1346 (9th Cir.) (per curiam), cert. denied, 506 U.S. 871, 506 U.S. 884, and 506 U.S. 1020 (1992); *United States* v. *Privette*, 947 F.2d 1259, 1262-1263 (5th Cir. 1991), cert. denied, 503 U.S. 912 (1992);[6] but see *United States* v. *Edwards*, 994 F.2d 417, 423-424 (8th Cir. 1993) (holding that separate uses of different weapons at different times during the course of a single, continuing predicate offense can support separate Section 924(c) convictions), cert. denied, 510 U.S. 1048 (1994). The court of appeals applied the majority approach to petitioners' multiple Section 924(c) convictions, upholding their consecutive sentences under that statute on the basis of separate underlying predicate convictions. See Pet. App. 17a-20a; *id.* at 19a

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[6] The majority's position accords with that taken by the Department of Justice with respect to prosecution of multiple Section 924(c) counts. See Memorandum from the Assistant Att'y Gen., Criminal Div. DOJ, regarding multiple convictions and sentences under 18 U.S.C. 924(c) (Aug. 24, 1999), *reprinted in* U.S. Dep't of Justice, *Federal Firearms Manual* App. A at 333-336 (3d ed. 2001).

(holding that Khan's four predicate crime-of-violence convictions may each support a consecutive Section 924(c) sentence); *id.* at 81a-83a.[7]

Petitioners maintain (06-1116 Pet. 8-9; 06-9398 Pet. 8-9), that several circuits have held that, even when multiple Section 924(c) counts are based upon different predicate offenses, consecutive Section 924(c) sentences are improper if the predicate offenses involve the same criminal "episode." Because adoption of that principle would not have affected petitioners' sentences, any inter-circuit conflict on that issue does not warrant this Court's review in this case.

In *United States* v. *Finley*, 245 F.3d 199, 207-208 (2d Cir. 2001), the defendant was convicted of possessing drugs with intent to distribute and drug distribution after an undercover officer purchased drugs and, imme-

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[7] In *United States* v. *Camps*, 32 F.3d 102, 106-109 (1994), cert. denied, 513 U.S. 1158 (1995), a different panel of the Fourth Circuit held, contrary to the majority view, that a single, continuing federal crime of violence can support multiple convictions and consecutive sentences under Section 924(c) when a defendant has used or carried a firearm on separate occasions during the course of the offense. Significantly, however, as petitioners acknowledge (06-1116 Pet. 3 n.2; 06-9398 Pet. 4 n.2), the panel in this case did not base its affirmance of petitioners' sentences on that principle. See Pet. App. 18a (noting that, because "Khan was convicted of *four* predicate crimes of violence, not a 'single predicate offense,' * * * we therefore [do] not need to count 'uses'"). Accordingly, this case provides no occasion for the Court to resolve any inter-circuit conflict on whether, and under what circumstances, a single predicate offense can support multiple Section 924(c) convictions. As the court below recognized, *id.* at 18a n.9, Judge Goodwin's dissent was premised on the mistaken assumption that the majority's holding rested on *Camps* and that consequently, under the reasoning of that case, it was necessary to determine whether the charged uses of a firearm were sufficiently distinct from one another to justify multiple, consecutive sentences.

diately thereafter, the arresting officers discovered the remainder of his drug stash along with a firearm that he had stored near the distribution operation. The defendant was also convicted and sentenced on two counts of using the firearm, one during and in relation to the possession-with-intent-to-distribute count and the other during and in relation to the distribution count. The court set aside the second Section 924(c) conviction on the ground that the statute "does not clearly manifest an intention to punish a defendant twice for continuous possession of a firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct." *Id.* at 207. That court has since described the principle of *Finley* as requiring that "a defendant who commits two predicate offenses with a *single* use of a firearm may only be convicted of a single violation of § 924(c)(1)." *United States* v. *Wallace*, 447 F.3d 184, 188 (2d Cir.) (emphasis added), cert. denied, 127 S. Ct. 541 (2006); see *United States* v. *Salameh*, 261 F.3d 271, 278 (2d Cir. 2001) (per curiam), cert. denied, 536 U.S. 967, and 537 U.S. 847 (2002).

Similarly, in *United States* v. *Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998), cert. denied, 528 U.S. 828 (1999), the court vacated the second of two Section 924(c) convictions, where there was "only one firearm and one use," in the course of two simultaneous violent felonies on a single victim, first degree murder and killing a witness. The court distinguished those facts, where "there was only one use of the firearm," from cases involving "distinct conduct giving rise to multiple crimes." *Ibid.* In *United States* v. *Johnson*, 25 F.3d 1335, 1336-1338 (6th Cir. 1994) (en banc), the court held that multiple convictions for violations of Section 924(c) were improper when the defendant used two firearms while "si-

multaneously" possessing two different controlled substances. *Id.* at 1336. And, in *United States* v. *Phipps*, 319 F.3d 177, 189 (5th Cir. 2003), the court held that multiple Section 924(c) convictions were unwarranted when defendants used "a single firearm a single time for a dual criminal purpose, then immediately discarded it." *Ibid.* It stressed the limited nature of its holding, noting that the result might have been different if the offenses were not virtually simultaneous or had involved different firearms. *Id.* at 188-189.

The analysis in those cases does not aid petitioners. As Chapman acknowledges (06-9398 Pet. 13), his first Section 924(c) conviction (Count 20) was predicated on his possession of a Saiga .308 caliber rifle and its transfer to a co-conspirator in December 2000. Pet. App. 81a. The purpose of the possession and transfer was to further the conspiracy to violate the Neutrality Act. *Ibid.* Chapman's second Section 924(c) conviction was predicated on the use and discharge of an AK-47 automatic rifle in September 2001, during his attendance at the LET camp in Pakistan, which the district court found to be not only in furtherance of a conspiracy to violate the Neutrality Act but also in furtherance of a conspiracy to provide material support to LET. *Id.* at 82a-83a. Thus, Chapman's Section 924(c) offenses plainly did not involve the use of a firearm on a single occasion during the simultaneous commission of multiple predicate offenses.

Similarly, the three Section 924(c) counts on which Khan was convicted and consecutively sentenced involved three different types of firearms—an AK-47 automatic rifle, a rocket-propelled grenade, and an anti-aircraft gun—each of which he possessed at different LET training camps in Pakistan. Pet. App. 82a-83a; C.A. App. 1033-1034, 1036, 1397-1398, 1400, 1619, 1624.

He received instruction involving the use of such firearms, during which he discharged such firearms, over a period of several weeks in September and October 2001. Pet. App. 82a-83a; C.A. App. 1397-1400, 1618-1625. Thus, Khan's Section 924(c) convictions likewise did not grow out of the use of a firearm on a single occasion during the commission of simultaneous predicate offenses: he therefore cannot benefit from the reasoning of *Finley* and similar cases. This case, therefore, presents no occasion to resolve any variation among the courts of appeals on this issue.[8]

b. Petitioners Khan and Chapman further maintain (06-1116 Pet. 9, 15; 06-9398 Pet. 9, 14) that "the Fourth Circuit's refusal to require that each firearm use be tied to a particular predicate is contrary to the rule in other circuits." That claim does not warrant this Court's review. As discussed above, the majority of the courts of appeals that have addressed the question have concluded that Section 924(c) requires that each firearm conviction be predicated on a different predicate crime of violence or drug trafficking offense. Consistent with that principle, the court below concluded that separate

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[8] Petitioners also invoke the rule of lenity as a justification for setting aside their multiple, consecutive Section 924(c) sentences. 06-1116 Pet. 14; 06-9398 Pet. 14. That principle has been applied by some courts of appeals where a single use of a firearm results in more than one Section 924(c) conviction (see *Anderson*, 59 F.3d at 1333) or where multiple Section 924(c) counts are based upon the continuing possession of a single firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct. See *Phipps*, 319 F.3d at 187-189. The purported statutory ambiguity that has prompted the application of the rule of lenity in such situations has never been held to extend to situations where, as in this case, the Section 924(c) violations involved different firearms with respect to multiple predicate offenses that are not virtually coterminous with one another.

predicate convictions supported each Section 924(c) conviction. Pet. App. 18a-20a; see *id.* at 82a-83a.

Petitioners' reliance upon *Cappas*, *supra*, is misplaced. In *Cappas*, a jury instruction permitted conviction on one of the Section 924(c) counts on the basis of either a predicate drug conspiracy count *or* a predicate extortion count. The drug conspiracy count was also the predicate offense for a second Section 924(c) conviction. 29 F.3d at 1191. Given the jury instruction, the court concluded that it was unable to determine whether the jury based the first Section 924(c) conviction on that same drug conspiracy. *Id.* at 1195. See *Privette*, 947 F.2d at 1262-1263 (holding that, because it could not determine whether the jury had based two Section 924(c) counts on the same predicate conviction, one Section 924(c) conviction must be vacated).

Here, in contrast, the district court was the factfinder. The court of appeals thus had no need to parse the jury instructions to ensure that the factfinder applied the correct law. With respect to Chapman's Section 924(c) convictions, the district court expressly found that each conviction was supported by a different predicate offense. Pet. App. 82a-83a. Although the findings were less explicit for Khan's Section 924(c) convictions, the court found that they were during and in relation to "the predicate conspiracy crimes of violence," *id.* at 83a, and Khan was convicted of sufficient predicate offenses to separately support each of his Section 924(c) convictions. *Id.* at 18a-20a. As the court of appeals concluded, because the district court was the factfinder, it did "not have to worry that the fact finder did not understand the law simply because she did not spell it out in detail." *Id.* at 20a n.11.

2. a. Petitioners claim (06-1116 Pet. 15-24; 06-9398 Pet. 15-24) that the trial court erred in failing to obtain written jury-trial waivers signed personally by petitioners, as opposed to their counsel, and by failing to inquire directly of petitioners whether they wished to waive a jury trial. Rule 23(a) of the Federal Rules of Criminal Procedure provides that "[i]f the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; (3) the court approves." Here, petitioners, through counsel, filed written motions to waive the right to a jury trial, the government concurred in those requests, and the court approved the motions. Pet. App. 6a; see pp. 7-8, *supra*.

Even assuming that written motions by counsel do not comply with the writing requirement of Rule 23(a)(1), see *United States* v. *Robertson*, 45 F.3d 1423, 1430-1431 (10th Cir.), cert. denied, 515 U.S. 1108, and 516 U.S. 844 (1995), the courts are in accord that no relief is warranted for failure to comply with Rule 23(a)'s formal requirements when the circumstances demonstrate that the defendant was not ignorant of his right to a jury trial and consented to the waiver. See, *e.g.*, *United States* v. *Leja*, 448 F.3d 86, 93-94 (1st Cir. 2006) (the absence of a personally-signed waiver or a colloquy relating to such waiver "does not require reversal where the evidence establishes that the defendant's waiver was knowingly and intelligently made") (collecting cases); *Robertson*, 45 F.3d at 1431 ("strict compliance with Rule 23(a) is not justified * * * where the record clearly reflects a defendant's waiver of the right is voluntary"); *United States* v. *Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984) (purely technical violations of Rule 23(a) not a basis for relief if the government demonstrates that, at the

time of the waiver, the defendant was not ignorant of his jury right), aff'd, 471 U.S. 773 (1985); *United States* v. *Page*, 661 F.2d 1080, 1083 (5th Cir. 1981) (where, despite non-compliance with Rule 23(a), it is apparent from the record that the defendant intentionally waived his right to a jury for tactical reasons, "[a defendant] cannot claim [on appeal] of the manner in which the trial court carried out his wishes"), cert. denied, 455 U.S. 1018 (1982).

In determining whether the trial record demonstrates that the waiver of the right to a jury trial was made knowingly, voluntarily, and intentionally, the courts consider a variety of factors circumstantially demonstrating that a waiver was validly given. These include: the defendant's education, background, and intellect (*Leja*, 448 F.3d at 94; *Page*, 661 F.2d at 1082); his presence in court when the trial judge's comments make it clear that the trial will be to the bench and the absence of surprise or objection with respect to such remarks (*e.g.*, *Leja*, 448 F.3d at 94; *Page*, 661 F.2d at 1083); and circumstances demonstrating a considered and deliberate "tactical decision that a bench trial would be to [the defendant's] advantage." *Page*, 661 F.2d at 1083 & n.5.

In this case, the record demonstrates, by similar circumstances, that petitioners knowingly and voluntarily consented to the waiver of their right to a jury trial. First, as the court below observed (Pet. App. 16a), it is apparent that petitioners' written requests for a bench trial, which were signed by counsel, were the product of a calculated trial strategy. The request by Chapman and joined by Hammad was presented as an alternative to a severance of their trial from that of Khan, against whom they maintained "inflammatory and prejudicial

evidence" would be presented that would be inadmissible in a trial involving only themselves. *Ibid.* Consequently, as in *Page*, 661 F.2d at 1083 n.5, "there was * * * a plausible reason for [these petitioners] and the experienced counsel who then represented [them] to conclude that a judge might approach the case more objectively and dispassionately than a jury."[9]

Further, during a pretrial hearing involving Chapman, the district court announced that it had before it his renewed motion for prejudicial joinder or, in the alternative, a motion to waive a jury. Addressing the motion, the court further observed that "if [the proceeding] continues as a jury trial as to Mr. Chapman, I will instruct the jury to try to segregate the information. However, you do have as the alternative a motion to waive jury, and I don't know what the government's view is on that * * *. The government has a right to trial by jury *as well as the defendant*, and so both sides have to agree on a waiver." C.A. App. 224-225 (emphasis added). The court then explained that, even if the co-defendants did not waive a jury, as to those who did, it would decide the question of guilt or innocence. *Id.* at 226. Chapman never suggested that he did not person-

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[9] Khan's written motion sought to join Chapman's motion for a bench trial. C.A. App. 281. Chapman's motion averred that trial to the court would "afford the accused with the opportunity to receive a fair trial." *Id.* at 221. It therefore appears that Khan also sought a bench trial for tactical reasons—avoidance of a trial by a jury which was not as likely to possess the same measure of objectivity as the court. Khan now suggests (06-1116 Pet. 25) that either the government or his co-defendants may have coerced him into waiving a jury and that, consequently, the district court should have conducted a separate inquiry to ensure that his waiver of a jury trial was truly voluntary. Khan has, however, failed to claim coercion, present evidence supporting such a claim, or otherwise demonstrate a particularized need for such an inquiry.

ally participate in the motion to waive a jury or that a bench trial, in which the court would return the verdict, was not in accordance with his wishes.

During a second pretrial hearing, in which all three petitioners and their attorneys participated, the court observed that, because the proceeding would be without a jury, counsel would no longer need to prepare jury questionnaires and would therefore have additional time to prepare for trial. C.A. App. 307. Thereafter, when the trial commenced, the court repeatedly stated that the proceeding would be a bench trial. See *id.* at 311-312, 314. Despite petitioners' presence on these occasions, none indicated that such proceedings were not in accord with their wishes. Cf. *Leja*, 448 F.3d at 94-95 (noting defendant's presence and lack of disagreement when, at the start of the trial, the court reiterated that the parties had waived a jury); *Page*, 661 F.2d at 1082 (noting that defendant, "a highly educated and articulate man, * * * in no manner exhibit[ed] objection or surprise as his counsel waive[d] jury trial").

Petitioners, who were all American-born and native English speakers, were well educated and fully capable of comprehending the trial judge's courtroom references to the absence of a jury and to the fact that the proceeding would be a bench trial.[10] Thus, the court of appeals properly concluded that the record sufficiently reflected that their waiver of a jury was knowing, intelligent, and voluntary.

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[10] Chapman held a bachelor's degree in Criminal Justice, had taken a course in criminal litigation, and had worked for the Virginia State Police. C.A. App. 258-260. Hammad excelled in junior college, and obtained an associate's degree. *Id.* at 2238, 2242, 2245. Khan, the son of a physics professor and a legal secretary, had also attended a community college. *Id.* at 2122-2123, 3523.

Indeed, to the extent that petitioners, with counsel, made a deliberate tactical decision to waive a jury in favor of a bench trial and asked the judge for that procedure, they invited any error and cannot complain of the procedure on appeal. See *Page*, 661 F.2d at 1083; see *Garrett*, 727 F.2d at 1012-1013. In this case, neither petitioners nor their counsel objected to a bench trial and petitioners expressed no surprise at such a proceeding. Significantly, petitioners do not claim that they were ignorant of their right to a trial by jury or that, if properly advised, they would have elected a jury trial. At the very least, the failure of petitioners to object to a bench trial at any point in the district court subjects their claim to review only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (all claims raised for the first time on appellate review are subject to the plain error rule); see *United States* v. *Vonn*, 535 U.S. 55, 73 (2002) (plain error rule applies to failure to object to deficient guilty plea colloquy under Federal Rule of Criminal Procedure 11). Petitioners have made no effort to meet that standard and, in any event, cannot show that it seriously affects the fairness, integrity, and public reputation of judicial proceedings (as is required to show reversible plain error) for a judge to grant a jury-trial waiver that petitioners requested for strategic reasons.[11]

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[11] Petitioners also maintain that this Court should grant review to direct district courts to conduct a colloquy with the defendant in each case to ensure that he understands his right to a jury trial and is voluntarily and knowingly waiving that right. See 06-1116 Pet. 19-20. That claim does not warrant this Court's review. Neither the Constitution nor Rule 23(a) contains a requirement that, when a jury waiver is proffered, the district court must conduct such a colloquy. See, *e.g.*, *Marone* v. *United States*, 10 F.3d 65, 67 (2d Cir. 1993). Some courts of

b. Petitioners' contention (06-1116 Pet. 17-19; 06-9398 Pet. 16-18) that the decision below conflicts with that of the Tenth Circuit in *Robertson* is incorrect. The holding in that case—that the absence of a written jury waiver signed by the defendant "is not necessarily fatal to the validity of that waiver" (45 F.3d at 1433)—is not materially different from the holding of the court below and the decisions of the other courts of appeals that have addressed the issue. Instead, reversal of the conviction in *Robertson* was based on the particular facts in that case, *i.e.*, that, where the district court not only failed to inquire concerning the defendant's decision as to the circumstances surrounding the waiver, but also never discussed, in the defendant's presence, the decision to waive the right to a jury, "there is nothing in the record * * * indicating [the defendant] personally understood her right and knowingly waived it." *Ibid.* Here, in contrast, the court below concluded that "the record reflects that [petitioners'] Rule 23 waivers were

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appeals (including the Fourth Circuit) have adopted such a colloquy requirement under their supervisory power or have suggested conducting such colloquies as a matter of prudence. See *e.g.*, *Leja*, 448 F.3d at 93 (collecting cases); *Marone*, 10 F.3d at 67 ("suggest[ing] the district courts inform each defendant, on the record, of the fundamental attributes of a jury trial before accepting a waiver"); *United States* v. *Cochran*, 770 F.2d 850, 852-853 (9th Cir. 1985) ("implor[ing]" district courts to conduct jury waiver colloquies but declining to adopt a mandatory supervisory rule requiring them); *United States* v. *Hunt*, 413 F.2d 983, 984 (4th Cir. 1969) (per curiam). Indeed, the court here reiterated that such colloquies "would be 'better practice.'" Pet. App. 15a (quoting *Hunt*, 413 F.2d at 984). But even courts of appeals that have adopted a supervisory rule requiring district courts to conduct waiver colloquies do not reverse convictions for failure to do so when the waiver is otherwise shown to be valid. See *United States* v. *Bishop*, 291 F.3d 1100, 1113-1114 (9th Cir. 2002), cert. denied, 537 U.S. 1176 (2003); *United States* v. *Rodriguez*, 888 F.2d 519, 527 (7th Cir. 1989).

a knowing, voluntary, and intelligent part of their trial strategy." Pet. App. 16a. Such factbound distinctions do not merit this Court's review.[12]

3. Petitioners maintain (06-1116 Pet. 26-29; 06-9398 Pet. 24-27) that the district court erred in failing to order discovery concerning their claims that their indictments for violations involving the Neutrality Act, 18 U.S.C. 960 (Counts 7-10), constituted impermissible selective prosecution. In the first place, petitioners were not convicted on the substantive Neutrality Act counts (Pet. App. 70a-71a, 78a, 83a). Although one of the conspiracy counts on which they were convicted (Count 1) included a Neutrality Act violation as an object offense (in which both Chapman and Hammad were found to be implicated), that count also included other object offenses, including conspiracy to provide material support to a terrorist group (LET) knowing and intending that the support was to be used to carry out crimes of vio-

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[12] Chapman and Hammad further maintain (06-9398 Pet. 22) that their election to proceed without a jury was the product of an impermissible "Hobson's choice * * * between a biased jury and a fair judge." But instead of conducting a voir dire examination of the venire to determine whether a jury could segregate the evidence, and independently and impartially assess the culpability of each defendant, these petitioners decided to forgo such an examination in favor of opting for a bench trial. Under such circumstances, a "purely subjective fear of inability to select an impartial jury, manifested by [the defendant's] waiver of a jury trial before even attempting voir dire, does not make [the defendant's] waiver involuntary in a constitutional sense." *Johnson* v. *Nix*, 763 F.2d 344, 348 (8th Cir. 1985). Defendants frequently must choose between options, even when electing one of the options may entail submitting to a factfinder believed to lack impartiality (with a consequent ability to raise such a claim on appeal). *United States* v. *Martinez-Salazar*, 528 U.S. 304, 315 (2000). Nothing would have foreclosed petitioners from going to trial before a jury, thereby preserving any claim they believed they had that a jury would be biased.

lence (Count 5), on which they were all convicted and which is not subject to a similar challenge. Thus, the question whether petitioners were prejudiced by the district court's failure to order discovery concerning selective prosecution with respect to the Neutrality Act is of limited significance.[13] In any event, the claim was properly rejected by the court of appeals and that fact-bound determination does not warrant this Court's review.

"The Attorney General and United States Attorneys retain 'broad discretion' to enforce the nation's criminal laws." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Wayte* v. *United States*, 470 U.S. 598, 607 (1985)). "'The presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" *Ibid.* (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)); see *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) ("Because [selective prosecution] claims invade a special province of the Executive * * * we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that the prosecutor has acted lawfully.") (quoting *Armstrong*, 517 U.S. at 465). Thus, "so long as the prosecutor has probable

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[13] The district court, however, predicated one of petitioner Chapman's Section 924(c) convictions on his conspiracy conviction (Count 1) insofar as it embraced a conspiracy to violate the Neutrality Act. Pet. App. 81a. That conspiracy count also constituted a basis (albeit unnecessary) for one of Khan's Section 924(c) convictions, but the district court determined that his participation in the conspiracy did not include the Neutrality Act. *Id.* at 70a-71a.

cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978).

Nonetheless, "'[s]electivity in the enforcement of criminal laws is . . . subject to constitutional constraints.' In particular, the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' including the exercise of protected statutory and constitutional rights." *Wayte*, 470 U.S. at 607-608 (quoting *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979), and *Hayes*, 434 U.S. at 364); see *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). As a consequence, to establish a claim alleging impermissible selective prosecution, "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 608).

Because a demand for discovery to support a selective prosecution claim "imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution" (*Armstrong*, 517 U.S. at 468), "the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." *Id.* at 464. In particular, "[t]he Courts of Appeals 'require some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent." *Id.* at 468 (quoting *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)). As to the element of "discriminatory effect," the courts require the production of "some evidence that similarly situated defendants * * * could

have been prosecuted but were not, * * * [a] requirement * * * consistent with [the Court's] equal protection case law." *Id.* at 469 (collecting cases).

Petitioners identify two groups, the CFF and the IRA, as "similarly situated" to them by virtue of the fact that their members also traveled from the United States to foreign nations for the specific purpose of engaging in armed conflict with a friendly government. Neither group, however, was "similarly situated" to LET, with which petitioners aligned themselves, because neither was in direct conflict with the United States. Shortly after the September 11, 2001, terrorist attack on the United States, LET proclaimed that, if the United States attacked Afghanistan, its members would "not leave [their] Afghanistan brethren in the lurch [but would] sacrifice their lives along with other Muslims against America and other disbelievers." C.A. App. 1867. On October 7, 2001, LET proclaimed that America had launched a war against Islam as part of a plan to massacre all Muslims in the world, and shortly thereafter, it called on the Muslim world to support the Taliban against the Americans. *Id.* at 1867-1869. Petitioners presented no similar evidence on the part of either CFF or the IRA of overt hostility against the United States or expressions of intent to support other terrorist groups in undertaking military action against it.[11] Thus,

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[11] Furthermore, petitioners err in their assertion that members of CFF have not been the subject of Neutrality Act prosecutions for their activities. Yasith Chhun, the President of that group, who petitioners have identified as a similarly situated but not charged person (C.A. App. 3235), has been charged in the Central District of California with a violation of the Neutrality Act and related offenses. See *United States* v. *Chhun*, No. 2:05-cr-00519-DDP-ALL (C.D. Cal. filed May 31, 2005); Press Release, U.S. Att'y C.D. Calif., DOJ, President of

as the court below observed (Pet. App. 26a), because LET presented a direct threat to the United States and its interests, it was a perfectly proper exercise "of the Government's enforcement priorities" (*Armstrong*, 517 U.S. at 465), to charge petitioners with supporting it.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Cambodian Freedom Fighters Arrested in Alleged Plot to Overthrow Cambodian Government (June 1, 2005) <http://www.usdoj.gov/usao/cac/news/pr2005/079.html>.